# INDEX

IN THE UNITED STATES COURT OF CLAIMS
Docket Entries

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|---|---|
| ARCHIE L. MASON AND MARGARET R. MASON, Administrators of the Estate of Rose Mason, Osage Allottee #327, a deceased restricted Osage Indian<br><br>vs.<br><br>THE UNITED STATES | Case No. 417-70 |

Osage trust funds wrongfully paid out to state taxing authorities

| Date | Proceedings |
|---|---|
| Nov 20 1970 | Filing fee of $10 paid by plaintiffs. |
| Dec 4 1970 | Court filed order referring case to Commissioner George Willi. |
| Dec 30 1970 | Defendant's motion for extension of time (to March 5, 1971) to file an answer filed. Copies (2) to atty. ALLOWED JAN 4 1971. |
| Mar 5 1971 | Defendant's motion for inclusion of third party defendant (the State of Oklahoma) filed. Copies (2) to atty. DENIED MAR 12 1971, ALSO SEE COURT ORDER OF APR 30 1971 see comr's. order. |
| Mar 5 1971 | Defendant's answer to petition filed. Copies (13) to atty. |
| Mar 12 1971 | Commissioner's order under Rule 41 and 12(c) denying defendant's motion for inclusion of third party defendant, filed. Copies (2) to parties. |
| Mar 19 1971 | Defendant's motion for extension of time (to April 14, 1971) to file request for review under Rule 53(b)(3) filed. Copies (2) to atty. ALLOWED MAR 23 1971. |
| Apr 8 1971 | Defendant's request for review of commissioner's order filed March 12, 1971, etc. filed. Copies (2) to atty. SEE COURT ORDER OF APR 30 1971. |

| Date | Proceedings |
|---|---|
| Apr 20 1971 | Plaintiffs' motion for leave to file memorandum in support of defendant's request for review of commissioner's order filed. Copies (2) to deft. |
| Apr 30 1971 | Court entered order granting defendant's request for review, vacating the trial commissioner's order of March 12, 1971 and granting defendant's motion, filed March 5, 1971, for inclusion of third-party defendant. Copy to parties. (Summons issued & delivered this day to deft's attorney for service: Apr 30, 1971). |
| Apr 30 1971 | Petition of U. S. against 3rd party Deft. filed. Copies to Pl. & 3pty. |
| Apr 30 1971 | Commissioner's order under Rules 12(c) and 38(a) filed. Copy to parties. (pltfs. to file reply within 40 days) |
| May 27 1971 | Return of U. S. Marshal showing service of Summons on Secretary of State, State of Oklahoma, on May 7, 1971 filed. Notice to parties. |
| Jun 9 1971 | Plaintiffs' motion for extension of time (to June 14, 1971) to file a reply to the fifth defense of the defendant's answer, as per the commissioner's order of April 30, 1971 filed. Copies (2) to deft. ALLOWED JUNE 10 1971. |
| Jun 14 1971 | Plaintiffs' reply to fifth defense of answer filed. Copies (13) to deft. |
| Jun 18 1971 | Third party defendant's (State of Oklahoma's) answer filed. Copies (10) to deft. and (3) to pltf. |
| Jun 24 1971 | Commissioner's order under Rule 111(a) filed. Copy to all parties. |
| Jul 1 1971 | Plaintiffs statement under Rule 111(a) filed. Copies (2) to deft, (1) to Duncan. |
| Jul 13 1971 | Defendant's response to commissioner's order of June 24, 1971 filed. Copies (2) to atty. and (1) to Duncan. |

| Date | Proceedings |
|---|---|
| Jul 15 1971 | Statement of third party defendant filed. Copies (14) to parties. |
| Jul 16 1971 | Commissioner's supplemental order under Rule 111(a) filed. Copy to all parties. (filings due August 2, 1971) |
| Jul 21 1971 | Plaintiffs motion for extension of time (to August 12, 1971) to file statement pursuant to commissioner's order filed. Copies (2) to deft. (1) to Duncan. ALLOWED JULY 22, 1971. |
| Jul 29 1971 | Defendant's motion for extension of time (to August 30, 1971) to file statement pursuant to commissioner's order filed. Copies (2) to pltf. and (1) to 3rd party. DENIED JUL 30 1971 with defendant allowed until August 12, 1971, the same extended date approved on plaintiff's request for an extension of time to comply with the subject order, to respond to the single inquiry directed to it under the order, i.e., whether it concedes for all purposes germane to the present litigation that the underlying tax assessment paid to Oklahoma was owing to the State of Oklahoma as a matter of law. |
| Aug 12 1971 | Defendant's response to commissioner's order of July 16, 1971 filed. Copies (2) to atty. and (1) to Duncan. |
| Aug 12 1971 | Plaintiffs statement under Rule 111(a) filed. Copies (2) to deft. and (1) to Duncan. |
| Aug 13 1971 | Commissioner's order under Rule 13(a) directing defendant to file dispositive motion (by September 27, 1971) and for other purposes filed. Copy to parties. |
| Sep 28 1971 | Defendant's motion for summary judgment and brief in support thereof filed. Copies (2) to parties. (BLOC) |
| Oct 27 1971 | Plaintiffs' motion for extension of time (to November 2, 1971) to file opposition to motion for summary judgment filed. Copies (2) to deft. ALLOWED OCT 29 1971. |

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|---|---|
| Nov 2 1971 | Plaintiffs' cross motion for summary judgment and opposition to defendant's motion for summary judgment and supporting brief filed. Copies (3) to deft. and (2) to 3rd party. |
| Nov 26 1971 | Defendant's motion for extension of time (to December 16, 1971) to file response on summary judgment filed. Copy to parties. ALLOWED DEC 14 1971. |
| Dec 14 1971 | Defendant's brief in opposition to cross motion for summary judgment, etc. filed. Copies (2) to parties. |
| Dec 29 1971 | Plaintiffs' brief in response to defendant's opposition to plaintiffs' cross motion for summary judgment filed. Copies (3) to deft. and (2) to 3rd party. |
| Mar 6 1972 | Argued and submitted on defendant's motion for summary judgment and plaintiffs' cross motion for summary judgment. Plaintiffs by letter to inform the court relative to an issue in the referred to *West* case in the Supreme Court. |
| Mar 14 1972 | Plaintiff's memorandum re West v. Oklahoma Tax Commission filed. Service on parties by plaintiff. |
| Jun 16 1972 | Judgment for plaintiffs against defendant and for defendant against the third-party defendant (State of Oklahoma) as set forth in the opinion with the amounts of recovery to be determined under Rule 131(c). Opinion by Judge Davis. Dissenting opinion by Judge Skelton. |
| Oct 18 1972 | Notice of filing in Supreme Court of a petition for writ of certiorari by State of Oklahoma (3rd party) filed. (on Oct 16 1972). No. 72-606. |
| Oct 31 1972 | Notice of filing in Supreme Court of a petition for writ of certiorari by United States on October 27, 1972, No. 72-654 filed. |
| Jan 18 1973 | Orders of the Supreme Court, dated January 15, 1973, granting the petitions for writ of certiorari filed. |
| Feb 1 1973 | Record in re certiorari forwarded to Clerk of the Supreme Court. |

IN THE UNITED STATES COURT OF CLAIMS

ARCHIE L. MASON AND MARGARET R. MASON, Administrators of the Estate of Rose Mason, Osage Allottee #327, a deceased restricted Osage Indian,

PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA,

DEFENDANT.

No. 417-70

PETITION

[Filed Nov. 20, 1970]

1. This is an action to recover certain Osage trust funds wrongfully paid out by the defendant to the State of Oklahoma taxing authorities. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1491.

2. Plaintiffs are the Administrators of the Estate of Rose Mason, a deceased Osage Indian who never received a certificate of competency under the Osage Allotment Act of 1906, 34 Stat. 539, as amended.

3. By virtue of the restricted or non-competent status of the decedent Rose Mason, defendant, through its agents, held, controlled and managed all of the assets and properties of said decedent which are the subject matter of this litigation and acted as a guardian or trustee with respect to said properties.

4. Defendant was under a statutory duty, pursuant to the Osage Allotment Act, 34 Stat. 539, as amended, to hold, manage and conserve the assets and properties of restricted, non-competent Osage Indians such as the above-named decedent, and, at the termination of such wardship, to turn over said properties free from any lien or encumbrance.

5. The decedent died on January 29, 1967. Upon her death, defendant, through its agents, prepared and filed an Oklahoma estate tax return for said decedent, and included therein, as part of the corpus of her estate, certain items

which were property held in trust by the defendant for the benefit of said decedent, namely, Osage headrights, securities and cash held by the defendant in trust for the decedent, and the share of the decedent in the Osage Nation Trust Fund. The trust items included were as follows:

| Trust Item | Declared Value |
|---|---|
| a. Osage Headrights | $48,649.98 |
| b. Securities held in trust | 19,989.88 |
| c. Cash held in trust | 7,002.89 |
| d. Unpaid headrights payment | 1,925.00 |
| e. Surplus Trust Funds | 48,393.17 |

Items b, c and d arose from headright payments credited to decedent.

6. Defendant, through its agents, computed the Oklahoma estate tax on the gross estate, including therein the value of the above described trust property, deducted the amount of such tax ($7,762.93) from the corpus of the estate of the decedent and paid such amount to the Oklahoma taxing authorities.

7. Defendant's payment of the Oklahoma estate tax on the trust properties described in Paragraph 5 hereof was erroneous and wrongful and in breach of its statutory obligation to turn over the trust properties free from any lien or encumbrance.

8. Defendant's erroneous and wrongful payment of the Oklahoma estate tax, as set forth above, depleted and reduced the value of the trust properties held, managed and controlled by the defendant, in violation of the Osage Allotment Act. Such erroneous and wrongful conduct has damaged plaintiffs in that the estate of the decedent has been depleted or reduced by such wrongful payment and has damaged the beneficiaries of the estate of the decedent in that their respective distributive shares of the decedent's estate have been depleted or reduced by such wrongful payment.

9. The defendant, as trustee and custodian of the funds of the decedent, and funds of the decedent's restricted Osage beneficiaries, owed a duty to pay interest at prevailing rates on said funds, under general fiduciary law, the Osage statutes, and 25 U.S.C. § 162a; and as a result, de-

fendant owes interest on the amounts wrongfully removed from the said funds, until restored.

WHEREFORE, plaintiffs pray for judgment against defendant in the amount of the Oklahoma estate tax wrongfully paid by defendant, and for the loss of interest on funds wrongfully paid in satisfaction of said estate tax.

/s/ Charles A. Hobbs
CHARLES A. HOBBS

1616 H Street, N.W.
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(NAtional 8-4400)

*Attorney for Plaintiffs*

Of Counsel:

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Pierre J. LaForce
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Fairfax, Oklahoma 74637

IN THE UNITED STATES COURT OF CLAIMS

| | |
|---|---|
| ARCHIE L. MASON, ET AL., PLAINTIFFS, v. UNITED STATES OF AMERICA, DEFENDANT. | No. 417-70 |

ANSWER TO PETITION

*First Defense*

The court lacks jurisdiction of the subject matter, and also of the United States which has not consented to a suit of this nature.

*Second Defense*

Plaintiffs are estopped by past conduct from now complaining of those facts alleged in their complaint.

*Third Defense*

The petition fails to state a claim upon which relief can be granted against the United States.

*Fourth Defense*

1. As to paragraph 1, it consists of conclusions of law requiring no answer.

2. As to paragraph 2, it is admitted that an Order Appointing Administrator dated November 5, 1970, purporting to appoint Archie L. Mason and Margaret R. Mason co-administrators of the estate of Rose A. Mason, Osage Allottee No. 327, is on file in the office of the County Court Clerk, Osage County, Oklahoma; and that Rose A. Mason was not granted a certificate of competency pursuant to the Act of June 28, 1906.

3. Paragraph 3 is admitted.

4. Paragraph 4 states conclusions of law requiring no answer.

5. Paragraphs 5 and 6 are admitted, except that the Osage Agency paid to the Oklahoma Tax Commission estate taxes in the amount of $8,087.10 vice $7,762.93; and except to the phrase "arose from headright payments", which phrase is ambiguous and neither denied nor admitted.

6. Paragraphs 7 and 8 are denied.

7. Paragraph 9 contains conclusions of law as to which no answer is required, and is otherwise denied.

8. The defendant denies each and every allegation of the petition not specifically admitted, denied or qualified herein.

*Fifth Defense*

1. Plaintiffs were co-administrators of the Estate of Rose Mason, Osage Allottee No. 327, in September 1967 when the United States paid $7,762.93 to the Oklahoma Tax Commission respecting the estate tax of Rose Mason. The plaintiffs appeared in person and by their attorneys, Files, Mahan and Wilson, in the County Court of Osage County, Oklahoma, on November 17, 1967; and the court, at the conclusion of the hearing, found that all taxes for which the estate was legally liable had been paid or arrangements had been made to pay them.

2. On May 10, 1968, in the County Court of Osage County, Oklahoma, the plaintiffs appeared through their attorneys, Files and Mahan, and the court discharged the co-administrators respecting the Estate of Rose A. Mason. The court also found that all taxes due and owing by said estate had been paid.

3. On December 4, 1968, an Order of the Oklahoma Tax Commission assessing estate, inheritance and transfer taxes was filed in the County Court of Osage County, In the Matter of the Estate of Rose Mason, Osage Allottee No. 327, deceased, Probate No. 8144, stating total tax and interest of $8,087.10 was assessed to the estate. Thereafter, in December 1968, the United States paid an additional $324.17 to the Oklahoma Tax Commission respecting this estate.

4. At the time of payment of the estate taxes to the State of Oklahoma by the United States, neither the plaintiffs nor their attorneys objected to payment of the Oklahoma estate taxes by the United States.

*Sixth Defense*

The State of Oklahoma is an indispensible party.

WHEREFORE, having fully answered, the defendant prays that the petition be dismissed.

Respectfully submitted,

/s/ Shiro Kashiwa
SHIRO KASHIWA
*Assistant Attorney General*

/s/ David W. Miller
DAVID W. MILLER
*Attorney*
*Department of Justice*

IN THE UNITED STATES COURT OF CLAIMS

ARCHIE L. MASON, ET AL.,
PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA,
DEFENDANT.

No. 417-70

REPLY TO FIFTH DEFENSE OF ANSWER *

[Filed Jun. 14, 1971]

In reply to the Fifth Defense of the defendant's Answer, plaintiffs state and allege as follows:

1. As to Paragraph 1 of said Fifth Defense, plaintiffs admit that they were co-administrators of the estate of Rose Mason; that they appeared in person and by their attorneys, Files, Mahan and Wilson, in the County Court of Osage County, Oklahoma on November 17, 1967. Plaintiffs deny that said County Court made any binding, conclusive or final determination with respect to the legal validity of the assessment of state death taxes against the Indian trust property of the decedent. In further reply, plaintiffs allege that, under the procedure followed by the defendant's representative (the Osage Agency) in the administration of restricted Osage estates, neither estate representatives nor said County Court are even advised of the payment of state death taxes by the defendant on Indian trust property. The Osage Agency considers that under the 1938 Amendment to the Osage Allotment Act, Sec. 1, 52 Stat. 1034, the United States has total responsibility for the payment of all taxes—state and federal.

2. As to Paragraph 2, plaintiffs admit that on May 10, 1968, in the County Court of Osage County, plaintiffs appeared through their attorneys, and the court discharged them as co-administrators respecting the estate of Rose

* This Reply is filed pursuant to the Commissioner's Order of April 30, 1971. Under the Rules of this Court, a Reply to an Answer is not allowed except by Order of the Court or the Commissioner. See Rule 31(a).

Mason. Plaintiffs deny that said court made any binding, conclusive or final determination with respect to the legal validity of the assessment of state death taxes against the Indian trust property of the decedent. In further reply, plaintiffs allege that the fact or amount of payment of state death taxes was not before said court, that said court has no independent audit review function with respect to the payment of state death taxes on Osage Indian trust property, that the Osage Indian Agency was exclusively responsible, under defendant's own procedures for the payment of tax liabilities, and that neither said court nor the plaintiffs had any responsibility with respect to said tax liabilities.

3. Plaintiffs admit the allegation of Paragraph 3. Plaintiffs further allege that the filing of the assessment order on December 4, 1968, was the first notice or information filed with the County Court with respect to the state death tax assessment or payment and that said filing occurred several months after the discharge of plaintiffs as co-administrators of the estate of Rose Mason.

4. In reply to Paragraph 4, plaintiffs state that, under the procedure used by defendant in connection with the administration of deceased Osage Indian estates, the Osage Agency is exclusively responsible for the preparation and filing of any tax returns and the payment of any tax liabilities based on Indian trust property. Plaintiffs had no responsibility with respect to any such tax liability. The tax return in question was prepared and signed by the Agency and the tax was directly paid by the Agency. Plaintiffs' consent was neither sought nor obtained with respect to such payment. For the foregoing reasons, plaintiffs deny the allegations contained in Paragraph 4 of defendant's Fifth Defense.

5. In further reply to the Fifth Defense, plaintiffs state that, under defendant's regulation relating to the estates of deceased Osage Indians (25 C.F.R. §§ 108.26-.28), administrators of the estate of a restricted Osage (and, specifically, plaintiffs with respect to the estate of Rose Mason), have virtually nothing to do with the trust property of a deceased restricted Osage Indian, beyond the ministerial function of arranging for passage of title. In fact, defendant, through the Osage Agency, exercises after death, as it did during life, the same untrammeled authority to

administer the trust property of a restricted Osage Indian. Plaintiffs were never in a position to consent or object to the payment of state death taxes. Preparation, execution and filing of the Oklahoma State death tax return and payment of the tax were functions and responsibilities arrogated or assumed by defendant alone. The decision to pay state death taxes in the instant estate was defendant's alone; there was no third party or court review of that decision.

Respectfully submitted,

By: Charles A. Hobbs
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(Telephone: 628-4400)
*Attorney for Plaintiffs*

Of Counsel:
Pierre J. LaForce
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IN THE UNITED STATES COURT OF CLAIMS

ARCHIE L. MASON AND MARGARET R. MASON, Administrators of the Estate of Rose Mason, Osage Allottee #327, a deceased restricted Osage Indian,

PLAINTIFFS,

v.

UNITED STATES OF AMERICA,

DEFENDANT.

No. 417-70

UNITED STATES OF AMERICA,

THIRD PARTY PETITIONER,

v.

STATE OF OKLAHOMA,

THIRD PARTY DEFENDANT.

PETITION BY THE UNITED STATES AGAINST THIRD PARTY DEFENDANT

The United States of America complains of the third party defendant and alleges:

1. Plaintiffs allege, in their petition which is incorporated herein by reference, that the United States wrongfully paid from certain Osage trust funds taxes to the State of Oklahoma taxing authorities.

WHEREFORE, the United States demands judgment against the third party defendant equal to such judgment, if any, as may be entered on behalf of the plaintiffs against the United States.

/s/ Shiro Kashiwa
SHIRO KASHIWA
*Assistant Attorney General*

/s/ David W. Miller
DAVID W. MILLER, *Attorney*
*Department of Justice*
Washington, D. C.

IN THE UNITED STATES COURT OF CLAIMS

ARCHIE L. MASON AND MARGARET R. MASON, Administrators of the Estate of Rose Mason, Osage Allottee #327, a deceased restricted Osage Indian,

PLAINTIFFS,

vs.

UNITED STATES OF AMERICA,

DEFENDANT,

UNITED STATES OF AMERICA,

THIRD PARTY PETITIONER,

vs.

STATE OF OKLAHOMA,

THIRD PARTY DEFENDANT.

No. 417-70

[Filed Jun. 18, 1971]

ANSWER OF THIRD PARTY DEFENDANT

*First Defense*

The Court lacks jurisdiction of the subject matter, and also of the State of Oklahoma which has not consented to a suit of this nature.

*Second Defense*

Plaintiffs are estopped by past conduct from now complaining of those facts alleged in their Complaint.

*Third Defense*

The Petition of plaintiffs fails to state a claim upon which relief can be granted against the State of Oklahoma.

*Fourth Defense*

The Petition by the United States against the third party

defendant fails to state a claim upon which relief can be granted against the State of Oklahoma.

*Fifth Defense*

The third party defendant denies that the United States wrongfully paid to the State of Oklahoma trust funds which are the subject of this action.

*Sixth Defense*

The State of Oklahoma denies that they are a proper party to this action and specifically denies liability to the United States for any action taken by it.

*Seventh Defense*

1. As to paragraph No. 1, it consists of conclusions of law requiring no answer.

2. As to paragraph No. 2, it is admitted that an Order Appointing Administrator, dated November 5, 1970, purported to appoint Archie L. Mason and Margaret R. Mason, co-administrators of the Estate of Rose A. Mason, Osage Allottee #327, is on file in the office of the County Court Clerk, Osage County, Oklahoma; and that Rose A. Mason was not granted a certificate of competency pursuant to the Act of June 28, 1906, as amended.

3. At the present time the State of Oklahoma does not have sufficient facts to admit or deny the allegations stated in paragraph No. 3 of plaintiffs' Petition.

4. Paragraph No. 4 states conclusions of law requiring no answer.

5. The State of Oklahoma does not have sufficient facts to admit or deny the allegations contained in paragraphs No. 5 and 6 of the plaintiffs' Petition except that the defendant, United States, through its agent did prepare and file an Oklahoma Estate Tax Return for said decedent and subsequently paid to the State of Oklahoma the amount of such tax, to wit: Eight Thousand, Eighty-seven Dollars and Ten Cents ($8,087.10).

6. Paragraphs No. 7 and 8 of the plaintiffs' Petition are denied.

7. Paragraph No. 9 contains conclusions of law to which no answer is required, and is otherwise denied.

8. Paragraph No. 1 of the Third Party Petition of the United States is denied.

9. The third party defendant denies each and every allegation of the Petition not specifically admitted, denied or qualified herein.

10. The third party defendant denies each and every allegation of the Third Party Petition not specifically admitted, denied or qualified herein.

WHEREFORE, having fully answered, the third party defendant prays that the Petition be dismissed and that neither the plaintiffs nor the third party petitioner take anything from the State of Oklahoma.

Respectfully submitted,

LARRY DERRYBERRY
*Attorney General of Oklahoma*

/s/ Paul C. Duncan
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/s/ Albert D. Lynn
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IN THE UNITED STATES COURT OF CLAIMS

No. 417-70

[Filed Apr. 30, 1971, Court of Claims]

ARCHIE L. MASON, ET AL.

v.

THE UNITED STATES

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Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

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ORDER

This case comes before the court on defendant's request, filed April 8, 1971, for review of the Trial Commissioner's order entered March 12, 1971, denying defendant's motion to join the State of Oklahoma as a third-party defendant. Upon consideration thereof, without oral argument,

IT IS ORDERED that defendant's said request for review be and the same is granted, the Trial Commissioner's order of March 12, 1971, is vacated, and defendant's motion, filed March 5, 1971, for inclusion of third-party defendant is granted.

April 30,1971.

By The Court
*Chief Judge*

No. 72-654

UNITED STATES,
PETITIONER,

v.

ARCHIE L. MASON, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 15, 1973.

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is consolidated with No. 72-606 and a total of one hour is allotted for oral argument.

☆ U.S. Government Printing Office: 1973—494-988/521

In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. ~~72~~-606

THE STATE OF OKLAHOMA,
*Petitioner,*

VERSUS

ARCHIE L. MASON and MARGARET R. MASON, Administrators of the Estate of Rose Mason, Osage Allottee No. 327, a Deceased Restricted Osage Indian, and THE UNITED STATES,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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*Counsel for Petitioners*

October, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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## APPENDICES



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OCTOBER TERM, 1972

No. .....

THE STATE OF OKLAHOMA,
*Petitioner,*

VERSUS

ARCHIE L. MASON and MARGARET R. MASON, Administrators of the Estate of Rose Mason, Osage Allottee No. 327, a Deceased Restricted Osage Indian, and THE UNITED STATES,
*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**

Petitioner, State of Oklahoma, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above captioned case on June 16, 1972, in Cause No. 417-70 in that Court.

## CITATIONS TO OPINION BELOW

The United States Court of Claims' written opinion is reported at 461 F.2d 1364 (1972). A copy of the decision of the United States Court of Claims is contained in the appendices to this petition.

## JURISDICTION

The judgment of the United States Court of Claims was entered on June 16, 1972. On the 12th day of September, 1972, Mr. Justice White granted petitioner's application for additional time in which to file his petition for writ of certiorari to October 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1225.

## QUESTIONS PRESENTED

1. Is an inferior court bound to follow a decision of the United States Supreme Court directly in point if it believes the law to have changed?

2. If the United States breached its fiduciary relationship with the Osage Indians by failing to bring a lawsuit to test the applicability of the existing United States Supreme Court decision, does the United States Government's failure to bring such a lawsuit create liability on the State of Oklahoma?

3. May the State of Oklahoma be held liable retrospectively for following a United States Supreme Court decision directly in point?

4. Is the law set forth in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948), governing the payment of estate tax on the estates of the deceased incompetent Osage Indians still controlling?

## STATEMENT OF THE CASE

On November 20, 1970, an original action against the United States was brought in the United States Court of Claims by Archie L. Mason and Margaret R. Mason, Administrators of the Estate of Rose Mason, Osage Allottee No. 327, a deceased restricted Osage Indian. The action against the United States is maintained on an alleged breach of fiduciary relationship created by the Osage Allotment Act of 1906, 34 Stat. 539 (often amended).

The Osage Allotment Act, *supra*, divided tribal lands and funds equally among 2,229 tribal members thereby creating "headrights," a term used to describe each of the fractional shares of the distributable income from the minerals together with a reversionary title to a like share of minerals whenever the mineral trust terminates. Under this Act, royalties resulting from the mineral production is placed in the United States Treasury and credited to individual members of the tribe. Although this trust was initially created for a period of 25 years, by statutory amendment, the trust period has been extended to 1983 (52 Stat. 1034, §3). During the period of the trust, legal title to the minerals is in the United States as trustee, but thereafter will vest absolutely in the allottees or their heirs (Section 2(7) and Section 5 of the Act, *supra*).

The Osage Allotment Act, *supra*, further provided for the issuance by the Secretary of Interior certificates of competency to adult Osages who were "fully competent and capable of transacting his or her own business and caring for his or her own individual affairs."

Rose Mason was an Osage Indian living in Oklahoma who never received a competency certificate. Therefore, the United States held in trust certain of her property. On the death of Rose Mason, the United States through the Osage Agency prepared, signed and filed an Oklahoma estate tax return, including therein as part of the corpus of the estate, property held in trust by the United States. In accordance with the estate tax return, payments were made in September of 1967 and December of 1968 to the Oklahoma Tax Commission, of estate taxes from the trust fund of Rose Mason held by the United States. The levy of such tax by the State of Oklahoma and payment thereunder by the United States was based on the United States Supreme Court decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948) (Appendix B), which until the present case has been the only expression by this Court of the propriety in levying and collecting such a tax from the Osage.

Archie L. Mason and Margaret R. Mason were appointed co-administrators of the estate of Rose Mason by the County Court of Osage County, Oklahoma, and were subsequently discharged as co-administrators in May of 1968. It is admitted that as administrators, Archie L. Mason and Margaret R. Mason did not participate in the filing of the estate tax return, or the payment of the estate taxes. In November of 1970, the District Court of Osage County allowed the estate of Rose Mason to be reopened, and thereafter reappointed Archie L. Mason and Margaret R. Mason as co-administrators for the specific purpose of instituting a lawsuit to determine if the estate taxes had been erroneously paid.

Thereafter an action was maintained in the United States Court of Claims against the United States for a breach of fiduciary relationship in the payment of the Oklahoma estate tax. The State of Oklahoma was impleaded as a third party defendant by the United States, and the United States sought a judgment against the State of Oklahoma in an amount equal to the judgment, if any, which might be obtained against the United States by the administrators.

The case was argued in the United States Court of Claims, and was decided by that Court on June 16, 1972 (Appendix A). By its decision, the United States Court of Claims ruled that *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948), does not represent the current state of the law, and that the United States breached its fiduciary relationship in paying the estate tax levied by the State of Oklahoma and was liable for such payment. In turn, the State of Oklahoma was found to be liable to the United States for the full amount of the judgment against it, *Mason* v. *U. S.*, 461 F.2d 1364, 1379 (1972), (Appendix A-25).

It is from this decision of the United States Court of Claims that petitioner seeks review by the Supreme Court.

## REASONS FOR GRANTING THE WRIT

I

Substantial rights of many private citizens and governmental entities are dependent upon a definitive statement by this Court as to the ability of the State of Oklahoma to collect the estate tax in question. With the advent of the *Mason* v. *U. S.*, 461 F.2d 1364 (1972), decision by the United States Court of Claims, an irreconcilable conflict exists upon an identical fact situation between that Court in *Mason* and the United States Supreme Court in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948). Although the petitioner feels strongly that the *West* decision still controls, future payment of estate taxes will not be made by the United States in light of *Mason*, and indeed such payments are currently being withheld by the United States pending this Court's ultimate decision. Further, following the *Mason* decision, a class action was instituted on July 11, 1972, in the United States Court of Claims, styled *Wilson, et al.* v. *U. S.*, Court of Claims No. 285-72, for recovery on behalf of all "heirs, beneficiaries, and personal representatives of deceased restricted Osage Indians whose estates were reduced by the wrongful payment by the defendant of Oklahoma estate taxes." This action seeks recovery for over 300 members of the class, and does not appear to be limited to any point in time. In that action, the State of Oklahoma has again been made a third party defendant and will be held ultimately liable by the Court of Claims under its ruling in *Mason* unless relief is granted by this Court.

Additionally, on July 14, 1972, the United States filed an action in the United States District Court for the West-

ern District of Oklahoma against the State of Oklahoma (*U. S.* v. *State of Oklahoma,* Court No. CIV-72-493), in which it seeks the following recovery:

> "1. The State of Oklahoma make an accounting to the United States as to all inheritance type taxes paid to it by the United States over the years that fall within the terms of the decision of the United States Court of Claims in *Mason* v. *United States;*
>
> "2. The State of Oklahoma pay over to the United States all such taxes erroneously paid, plus such interest as the Court determines proper; and
>
> "3. For such other and further relief as the Court may deem just."

The United States bases this action on the Court of Claims' decision in *Mason* and seeks recovery "over the years that fall within the terms of the decision." It appears that the United States may, like the petitioner, have difficulty in determining the period of time which *Mason* purports to cover, as they did not specify a time period within their complaint. It has been agreed by the parties in this case, that no action will be taken until such time as the Supreme Court has had an opportunity to review the *Mason* decision.

For this petitioner, although it is felt that the law set forth in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948), is still controlling, the gravamen of the issue is not a possible overturning of *West* by the United States Supreme Court which would be applied prospectively. It is of great concern to petitioner that under the apparent ruling in *Mason* v. *U. S.,* 461 F.2d 1364 (1972), petitioner might be ultimately liable for an unspecified period of time as a result of the breach of fiduciary duty over which petitioner had no control.

II

From the outset, it is agreed by the parties and recognized by the Court that the factual situation existing in the instant case is identical to that in *West*.

> "Five years later, this holding was applied to the *very type of trust property now before us*—Osage headrights (and funds derived therefrom) and shares of Osage trust fund (derived from the Kansas lands) held in trust by the United States for the Indians. *West* v. *Oklahoma Tax Commission, supra*, 334 U.S. 717 (1948). . . ." *Mason* v. *U. S.*, 461 F.2d 1364, 1370 (1972). (Appendix A-8-9). (Emphasis added.)

The Court of Claims after recognizing the identity of factual relationship between *Mason* and *West*, then agrees with petitioner's position that the last word from the Supreme Court interpreting the question raised today is contained in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948) (Appendix B). The Court of Claims stated in *Mason*:

> "The *West* opinion is the last word from the Supreme Court *directly on point*, but it is not the last word on Indian tax immunity." *Mason* v. *U. S.*, 461 F.2d 1364, 1370 (1972). (Appendix A-9). (Emphasis added.)

After recognizing the import of the *West* decision to the identical fact situation, the only way in which the Court of Claims could arrive at its decision in *Mason* was to deny the integrity of *West* since it was impossible to distinguish it away on the basis of the facts in *Mason*. The Court indicated an understanding of the problems in an inferior court overruling a United States Supreme Court

decision, but once recognizing the problem, the Court proceeded to do just that.

> "Appraisal of the applicability of the tax necessarily thrusts us into an inquiry of the current status of *West* v. *Oklahoma Tax Commission*, supra, 334 U.S. 717 (1948). For an inferior tribunal this is a most delicate undertaking. *It goes without saying that we cannot refuse or fail to follow a Supreme Court decision, directly in point, because we disagree with its reasoning or think it erroneous.* But our responsibility differs where there have been significant developments—in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court decision have been seriously weakened or eroded." *Mason* v. *U. S.*, 461 F.2d 1364, 1374 (1972). (Appendix A-17-18). (Emphasis added.)

In a decision in *McCorkle* v. *First Pennsylvania Banking & Trust Company*, 459 F.2d 243 (1972), the Fourth Circuit Court of Appeals addressed itself to a similar problem as indicated by the Court of Claims in *Mason*. In *McCorkle* the Court stated:

> "It would be sheer presumption for an inferior tribunal to undertake to overrule an explicit decision in the Supreme Court from which the court has given no hint of departing, no matter what may be thought of the wisdom of that decision. It is a function of the Supreme Court to correct our errors; it is not our function to rectify what we may consider mistakes of the Supreme Court." *McCorkle* v. *First Pennsylvania Banking & Trust Company*, 459 F.2d 243, 249 (1972).

In writing his dissenting opinion in *Mason*, Judge Skelton succinctly stated the problem in the majority's reasoning:

> "I think the majority has fallen into error in refusing to follow the decision of the Supreme Court in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717, 68 S.Ct. 1223, 92 L.Ed. 1676 (1948), which it admits involves the identical problem we have in the instant case and is the only decision of that court that has ever decided the exact question we have before us. That case has never been overruled and the law under which it was decided has not been changed. Consequently, we are required to follow it." *Mason* v. *U. S.*, 461 F.2d 1364, 1379 (1972). (Appendix A-26).

Properly, the Court of Claims might have been sympathetic with the position of the Osage in the *Mason* case. However, the Court's personal feelings notwithstanding, it cannot be more than mere conjecture or speculation as to what the Supreme Court would do if again faced with the question presented in *West*. As previously indicated, the Court of Claims relied heavily upon what it considers a significant development in the Supreme Court itself, which must only be the decision of *Squire* v. *Capoeman*, 351 U.S. 1 (1956).

While not elaborating here on the apparent distinctions between *Squire* and *West* (See part IV of petition, p. 16), it should be noted that although the Court of Claims felt that *Squire* was a significant development in the Supreme Court, no effort was made to explain why the Supreme Court in deciding *Squire* made no reference to the *West decision*. To assume that *Squire* either directly or indirectly was contemplated by the Supreme Court to

affect the *West* decision, is to permit conjecture not substantiated by the case holding.

Next, the Court of Claims states that developments in the lower courts or in relevant administration practice weakened or eroded the underpinnings of the Supreme Court decision in *West* (See page 9, *supra*). This concept is difficult to understand. How can an inferior court by any action weaken a decision of the Supreme Court? If the Court of Claims is correct in this interpretation, it requires each fiduciary to become immediately aware of all lower court decisions which seem in any way contrary to a holding of the United States Supreme Court and places a possible legal liability upon a fiduciary who fails to continually test to determine what the law might become as the result of the lower court rulings. One can feel no safety in reliance on what the Supreme Court has stated the law to be.

In making its ruling in *Mason*, the United States Court of Claims has shifted the burden of perfecting an appeal to question an existing United States Supreme Court decision from those seeking relief and a change of such decision to those who in the past in good faith relied upon it. Certainly had the Court of Claims ruled that it could not overturn the decision of the Supreme Court in *West*, it would not have foreclosed the Osage from seeking relief in the Supreme Court. Instead, it is now up to this petitioner to justify its action throughout the years since *West* and in effect have the burden of going forward and relitigating the past decision. If this is allowed by the Supreme Court, there seems nothing to prevent the Court of Claims at some time in the future again deciding that the law of

*West* is improper and again forcing this petitioner or the United States to assume an unjust burden of appealing.

It is interesting to note that by *Mason,* the Court of Claims may have placed additional burden upon the Supreme Court to in effect review its own decision. Had the lower decision originally been in favor of the United States and the State of Oklahoma, it would have been incumbent upon the Osage to perfect its appeal if relief was sought. The Supreme Court could have under those circumstances found *West* to be current law and denied certiorari. If the law should be changed, the Supreme Court could accept jurisdiction and properly overturn the *West* decision.

However, under the present circumstances, for the Supreme Court to deny certiorari to this petitioner requesting a review of the lower decision, leaves the law in a state of quandary. Now, not only must the Supreme Court take jurisdiction if it wishes to overturn the *West* decision as before (certainly *West* must be considered the law irrespective of the lower court decision or else the parties could change the law by merely refusing to appeal such decision) it must additionally take jurisdiction if it wishes to affirm its prior ruling in *West.* It would seem that this is an improper posture for the Supreme Court to be placed by an inferior tribunal.

To allow a Court of Claims to overrule the long-standing precedent of the Supreme Court in the *West* decision in this manner is to abdicate by the Supreme Court its power granted under Article III, §1 of the United States Constitution.

III

In order to hold ultimately against this petitioner, it was necessary for the Court of Claims to determine that the United States breached its fiduciary duty to the Osage Indian, presumably by failing to bring a lawsuit to test the *West* decision in light of "other developments" which the Court of Claims deems significant. Petitioner urges that the United States did not breach its fiduciary duty to the Osage, but that even if that were the case, it should not create liability on the State of Oklahoma.

The Court of Claims apparently feels that the United States should have brought an action to test *West*, but does not specify when such an action should have been brought. (The point of time in which such action should have been brought must of necessity under the *Mason* rule be the time at which the United States breached its fiduciary relationship and thereby created liability on both itself and the petitioner, State of Oklahoma.) The Court stated:

> ". . . For we are satisfied that, by 1967 and 1968 when the tax was handed over, the shadows on that decision (West) loom so large that the Government, as fiduciary with the obligation to protect the Indian, should have tested the current acceptability of *West* by challenging collection of the tax. . . ." *Mason* v. *U. S.*, 461 F.2d 1364, 1372 (1972). (Appendix A-13.)

The shadow which the Court refers to consists of *Squire* v. *Capoeman*, 351 U.S. 1 (1956), two cases decided by the Court of Claims, *Big Eagle* v. *United States*, 300 F.2d 765 (1962), *Beartrack* v. *United States*, Ct. Cl. No. 281-67 (1967) (a case settled by the United States on October 25, 1968), and an internal revenue ruling handed down

after the payment of this tax in question on April 7, 1969, in Rev. Rul. 69-164. It is to be pointed out that only one of the decisions, *Squire,* was made by the Supreme Court, and from reading that decision, no attempt was made to change *West.* After recitation of these cases, the Court of Claims stated:

> "From all this, the Department of Interior would have to conclude, in our view, that there was at the very least a serious question whether *West* remains viable and that, as a fiduciary for Rose Mason and her estate, the United States would have to test that issue by protesting the payment of the tax and litigating its applicability." (By footnote, the Court pointed out that the federal government brought a suit to recover the inheritance taxes imposed by Oklahoma in *Oklahoma Tax Commission* v. *United States,* 319 U.S. 598.) *Mason* v. *U. S.,* 461 F.2d 1364, 1372). (Appendix A-14).

Once deciding that the United States did in fact breach its fiduciary relationship with the Osage Indian by not refusing to pay to the State of Oklahoma the estate tax or otherwise testing the *West* decision, the Court holds the State of Oklahoma liable to the United States.

> "If, as we have just held, the Oklahoma estate tax should not have been paid or collected with respect to this Indian trust and restricted property, the State is liable over to the United States, which, as trustee, improperly paid the tax. As trustee, the United States can sue for return of the money." *Mason* v. *U. S.,* 461 F.2d 1364, 1379 (1972). (Appendix A-25).

In support of this holding, the Court of Claims cites a United States Supreme Court decision of *Poafpybitty* v. *Skelly Oil Company,* 390 U.S. 365, 369-70 (1968). Unquestionably, *Poafpybitty* stands for the proposition that the

United States can sue for return of money where it is trustee as well as allowing the Indians to maintain an action on their own. However, this case did not turn on the United States having breached a fiduciary relationship nor does it discuss this question. It is contended by petitioner that the United States could have at any time, instituted an action on behalf of the Indian questioning the *West* decision as the Court of Claims thought it should. However, had this been done, and had the United States successfully overturned the *West* decision, there would have been a specific determination that Oklahoma could no longer collect the estate tax from that point in time forward. No serious argument can be made that Oklahoma would have to repay any estate tax collected from the time of the *West* decision until its overturning by the Supreme Court.

The Court of Claims seems to find by failing to specify when the United States breached its fiduciary relationship yet allowing it total recovery against the State of Oklahoma, that the State of Oklahoma can be held liable for the negligence of the United States resulting in its breach of fiduciary relationship with the Osage Indian, and in fact places Oklahoma in the position of being a fiduciary for the benefit of the Osage Indian. For the Court of Claims to make this holding completely exonerates the United States for its wrongdoing (as determined by the Court of Claims), and places the burden totally upon the State of Oklahoma. Although the United States was a party and had knowledge to the decisions which the Court of Claims says "cast shadows" on *West*, Oklahoma was not a party and perfectly entitled to rely on the *West* decision. How then, may the

State of Oklahoma be held liable retrospectively for following a United States Supreme Court decision directly in point?

If the Court of Claims is correct, from what point is the State of Oklahoma liable? Is it the time when the *Squire* case was handed down in 1956 or should the State of Oklahoma have insisted the United States sue it after a 1969 internal revenue ruling? At all times that the State of Oklahoma collected the estate tax from the Osage Indian, it did so under the authorization and therefore protection of the United States Supreme Court decision. To allow an inferior court to strip away this protection for an unspecified period of time and place no monetary responsibility on the fiduciary (which the Court found to have been wrong) should not be upheld by the Supreme Court.

IV

To determine whether *West* v. *Oklahoma Tax Commission, supra,* is presently good law, careful attention will be given to *Squire* v. *Capoeman,* 351 U.S. 1 (1956), as being the only Supreme Court case cited by the United States Court of Claims in the *Mason* decision. Mr. Chief Justice Warren, in delivering the opinion of the Court in *Squire,* stated:

> "The question presented is whether the proceeds of the sale by the United States Government of standing timber on allotted lands on the Quinaielt Indian Reservation may be made subject to capital-gains tax, consistently with applicable treaty and statutory provision and the government's role as respondents, trustee and guardian." *Squire* v. *Capoeman,* 351 U.S. 1, 2 (1956).

In *Squire, supra,* the respondents were noncompetent Quinaielt Indians, born on the reservation. Pursuant to the General Allotment Act of 1887 the respondents were allotted 93.25 acres of reservation and received a trust patent. The land in question was described as forest land covered with trees in excess of 100 years old and not adaptable to agricultural purposes. It was further admitted that the land would have little value after the timber was cut.

In 1943, the Department of the Interior contracted for the sale of the timber on respondents' land and a long-term capital-gains tax was levied upon the sum received. In refusing to allow the imposition of such a tax, the Supreme Court quoted with approval an opinion of an Attorney General as follows:

> ". . . In other words, it is not likely to be assumed that Congress intended to tax the ward for the benefit of the guardian. [footnote omitted]." *Squire* v. *Capoeman,* 351 U.S. 1, 8 (1956).

The Court further stated:

> ". . . Respondents' timber constitutes the major value of his allotted land. *The government determines the conditions under which the cutting is made.* Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence." *Squire* v. *Capoeman,* 351 U.S. 1, 10 (1956). (Emphasis added.)

*Squire* v. *Capoeman, supra,* differs markedly on its facts and the law applied and is readily distinguishable

from the *West* decision. As Judge Skelton pointed out in his dissenting opinion in *Mason*:

> "In that case (*Squire*), the court was dealing with a *direct tax* on the property of a *living noncompetent* Indian and no inheritance tax imposed by a state was involved. Furthermore, the tax would be imposed on the property of the wards by their guardian during their lifetime. No such facts exist in *West* nor do they exist in our case." *Mason* v. *U. S.*, 461 F.2d 1364, 1380 (1972). (Appendix A-28). (Emphasis added.)

*Squire, supra,* involves a direct tax, levied by the guardian on his ward, during the ward's lifetime, on property over which the guardian had total control (including at what time sale is to be made), and after a sale leaves for all practical purposes valueless that which remains for the benefit of the Indian. In the present case as in *West* an estate tax was levied by the State after the noncompetent Indian is deceased. This does not defeat the principle of *Squire,* in attempting to preserve for that noncompetent Indian as much of his allotment as possible. There is nothing to show that the heirs of *Mason* were themselves noncompetent Indians and entitled to the consideration set forth in *Squire.* Finally, in *Squire,* the guardian had total control over the advent of the tax consequence, whereas in the present case the State exercises no such control. It seems clear that both in fact and rationale the *Squire* case is distinguishable from the decision in *West,* and therefore the principles of *West* are still the law to be followed.

## CONCLUSION

Substantial rights of many private citizens and governmental entities are dependent upon this Court's resolving the conflict created by the United States Court of Claims' decision in *Mason* v. *U. S.*, 461 F.2d 1364 (1972), which is in direct conflict with the United States Supreme Court decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948). As the result of *Mason*, not only is the State of Oklahoma effectively barred from collecting estate tax authorized under the Supreme Court decision, but additionally extensive litigation has been filed in the lower courts attempting to receive a refund for past taxes paid.

If the Supreme Court does not grant certiorari and review the actions of the Court of Claims in *Mason* v. *U. S.*, 461 F.2d 1364 (1972), then not only is the law with respect to estate taxes of restricted Osage Indians unclear, the Court would appear to be giving tacit approval to an inferior court's speculation as to changes which might come about if the Supreme Court reviews its decision.

If *Mason* is not reviewed by the Supreme Court, then the State of Oklahoma may be subjected to liability, to the same extent as a fiduciary, when it had no control over the situation giving rise to that liability. Furthermore, it appears that this liability may be for an undetermined amount of time as it is at least difficult to determine when the Court of Claims contemplated the United States breached its fiduciary duty to the Osage Indian. Furthermore, *Squire* v. *Capoeman*, 351 U.S. 1 (1956), does not change the rule of law announced in *West*, and that being the only United States Supreme Court decision cited by

the Court of Claims in deciding *Mason*, the *West* case must still be considered the law.

Petitioner contends that the actions of the United States Court of Claims in holding as it did in *Mason*, creates a conflict between its holding and that of the Supreme Court in *West* v. *Oklahoma Tax Commission, supra.*

WHEREFORE, premises considered, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above captioned case on June 16, 1972, in Cause No. 417-70 in that Court.

Respectfully submitted,

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October, 1972

## APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS
No. 417-70

(Decided June 16, 1972)

ARCHIE L. MASON AND MARGARET R. MASON, ADMINISTRATORS OF THE ESTATE OF ROSE MASON, OSAGE ALLOTTEE #327, A DECEASED RESTRICTED OSAGE INDIAN v. THE UNITED STATES

THE UNITED STATES v. STATE OF OKLAHOMA, THIRD PARTY DEFENDANT

*Charles A. Hobbs* for plaintiffs. *Pierre J. LaForce, Wilkinson, Cragun & Barker* and *Files, Mahan & Wilson,* of counsel.

*David W. Miller,* with whom was *Assistant Attorney General Kent Frizzell,* for defendant.

*Paul C. Duncan,* Assistant Attorney General, State of Oklahoma, for third party defendant.

Before COWEN, *Chief Judge,* DURFEE, *Senior Judge,* DAVIS, SKELTON, NICHOLS, and KUNZIG, *Judges.*

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge,* delivered the opinion of the court:

This case presents the sensitive problem of whether we should continue to follow a ruling of the Supreme Court

which is said no longer to be good law. The decision is *West* v. *Oklahoma Tax Comm'n*, 334 U.S. 717 (1948), upholding the right of Oklahoma to levy its estate tax on certain trust property of restricted Osage Indians. Officials of the Bureau of Indian Affairs paid the tax on behalf of, and out of the estate of, a restricted Osage, and her administrators now claim that in doing so the Federal Government breached its fiduciary obligation and is therefore liable for the amount of the tax. The United States has impleaded Oklahoma and, if ruled responsible, seeks judgment over. We hold for plaintiffs against the Federal Government, and for the latter against the state.

Better to explain why we consider the two governments liable, we shall follow a somewhat winding path to the end: first, setting out the general nature of the property involved (Part I, *infra*); then, the particular facts of the case (Part II); third, disposing of defendant's preliminary objections to reaching the merits (Part III); next, setting forth the history of the taxation, both federal and state, of Osage restricted property (Part IV); fifth, discussing the Government's fiduciary obligation with respect to payment of the Oklahoma estate tax (Part V); then, the present status of the *West* decision, *supra* (Part VI); and, finally, the liability of Oklahoma (Part VII). The first four sections will be the necessary ramble through the lower reaches of the mountain while the last three will be the stiffer climb to the peak.

## I.

### *Osage restricted property*

The General Allotment Act of 1887, 25 U.S.C. § 331, empowered the President to allot reservation land to the Indians covered by the statute; the allotment was to remain in trust until the Indian was declared capable of managing it, when it would be turned over "free of all charge or incumbrance whatsoever." The Osages were omitted from this 1887 statute but were finally given their own allot-

ments by the Osage Allotment Act of 1906, 34 Stat. 539 (often amended).

Previously, "the Osage reservation was held by the United States in trust for the Osage tribe. By the [1906] act, the tribal lands and funds were equally divided among the 2,229 tribal members. The lands were surveyed and allotted directly to individuals and the minerals were evenly divided through the provision for 'headrights', which is the term used to describe a right to 1/2229th share of the distributable income from the minerals, plus a reversionary title to a like share of the minerals whenever the mineral trust terminates. The act provided that the royalties derived from the extraction of the minerals be placed in the United States Treasury and held in trust for a period of 25 years to the credit of the individual members of the tribe, subject to periodic distributions. By statutory amendment the trust period has been extended to 1983 (52 Stat. 1034, section 3). While the trust exists, legal title to the minerals is in the United States as trustee, but thereafter the minerals will vest absolutely in the allottees or their heirs. See section 2(7) and section 5 of the act, *supra*. These basic arrangements have not been changed in any of the 12 amendments to the act between 1906 and 1957." *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 667-68, 300 F. 2d 765, 765-66 (1962) (footnote omitted). See, also, *West* v. *Oklahoma Tax Comm'n*, *supra*, 334 U.S. 717, 719-23 (1948).

Tribal funds from the sale of tribal lands in Kansas were also divided equally by the 1906 act, which set up a Segregated Trust Fund for the 2,229 allottees in the sum of $3,819.76 each. Interest at 5% is to be paid until the trust ends in 1984, and the fund may be invaded by a non-competent Osage only with the approval of the Secretary of the Interior.[1]

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[1]The *West* opinion, *supra*, summarizes the status of all these trust properties (334 U.S. at 723): "Legal title to the mineral interests, the funds and the securities constituting the corpus of the trust estate is in

The 1906 statute likewise provided for issuance by the Secretary of certificates of competency to an adult Osage who was "fully competent and capable of transacting his or her own business and caring for his or her own individual affairs."

II.

*This case*

Rose Mason was an Osage living in Oklahoma who never received a competency certificate. For that reason the United States held in trust certain of her property, including headrights (described in Part I, *supra*), securities held in trust (derived from headrights), cash held in trust (derived from the trust fund described in Part I, *supra*), unpaid headrights payments (income from headrights), and surplus trust funds (derived from headrights).

On her death intestate, representatives of the Federal Government in the Osage Agency, under the usual practice, prepared, signed, and filed an Oklahoma estate tax return for her, including as part of the corpus of the estate the above items of trust property. In September 1967 and December 1968, the Osage Agency paid to the Oklahoma Tax Commission a total of $8,087.10 for state death taxes relating to the decedent. This payment was made out of trust funds of decedent held by the Government.

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[1] (Continued)

the United States as trustee. The United States received legal title to the mineral interests in 1883, when it took what is now Osage County from the Cherokees in trust for the Osages; and that title has not subsequently been transferred. Legal title to the various funds and securities adhered to the United States as the pertinent trusts were established and developed. Beneficial title to these properties was vested in the decedent and is now held by his sole heir, the appellant. The beneficiary at all times has been entitled to at least a limited amount of interest and royalties arising out of the corpus. And the beneficiary has a reversionary interest in the corpus, an interest that will materialize only when the legal title passes from the United States at the end of the trust period. But until that period ends, the beneficiary has no control over the corpus."

Plaintiffs are administrators of the estate of Rose Mason, appointed by the County Court of Osage County, Oklahoma.[2] They had nothing to do with the filing of the estate tax return, or the payment of the state taxes. They were discharged in May 1968, but in November 1970 the District Court of Osage County reopened the estate and reappointed plaintiffs "for the purpose of instituting such suit as may be proper to recover the estate taxes erroneously paid, together with interest thereon."

The result was the petition here, filed on November 20, 1970, alleging that the Federal Government breached its fiduciary duty in paying the Oklahoma estate tax on the trust properties described above. The United States impleaded the State of Oklahoma as third party defendant, asking for judgment against the state "equal to such judgment, if any, as may be entered on behalf of the plaintiffs against the United States."

Both the Federal Government and the plaintiffs have moved for summary judgment. The motion of the United States asks that, if plaintiffs prevail, there be recovery over against the state. Oklahoma has not moved for judgment, but it appeared and argued orally that the challenged tax was properly imposed on the trust property under *West* v. *Oklahoma Tax Comm'n, supra.*

III.

*Defendant's preliminary objections*

The United States interposes some preliminary reasons for dismissing the petition without reaching or even touching on the merits, but we reject those threshold defenses. One is that the plaintiffs, administrators of the estate, are not the proper parties to sue; Rose Mason's heirs are said to be the real parties in interest and indispensable suitors. The shortest answer is that under Rule 61(a) of our Rules the

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[2]State courts have probate jurisdiction of Osage estates under the Act of April 18, 1912, 37 Stat. 86.

plaintiffs may sue as duly authorized administrators on behalf of the estate, out of the funds of which the disputed tax was paid before distribution of the estate's assets to the heirs.

Another defense is that the claimants failed to exhaust their administrative remedies by omitting to appeal within the Bureau of Indian Affairs, under 25 CFR § 2.3 (1967), from the Osage Agency's payment of the tax.[3] It is unlikely that this §2.3 intended to cover as a "decision" the action of the Osage Agency in paying the tax; some more formal determination seems to have been contemplated since 25 CFR § 2.2 and 2.4 require such "decisions" to be put in writing and that notice be given to the affected Indian—and neither of these directives was fulfilled here. In any event, the administrative appeal is optional, not mandatory—the regulation says the affected Indian "may" appeal—and under the familiar principle does not preclude a court suit.

In its own motion for summary judgment (which was filed first), the defendant sought to reserve, as "factual matters" calling for further trial proceedings, its separate defense that plaintiffs are barred by their failure to object to the payment of the tax.[4] However, after the plaintiffs filed their motion for summary judgment the Government did not file any affidavits or indicate in any other way that there were further facts to be tried or found. We shall

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[3]This regulation provides:

"In accordance with the procedure in this part, any interested party adversely affected by a decision of an official under the supervision of an Area Director of the Bureau of Indian Affairs may appeal to the Area Director; an appeal may be taken to the Commissioner of Indian Affairs from a decision of the Area Director; and an appeal may be taken to the Secretary of the Interior from a decision of the Commissioner."

[4]These defenses averred that plaintiffs "are estopped by past conduct from now complaining of" the facts alleged in the petition, and specified the failure to object as well as the ruling of the County Court originally discharging the administrators and declaring that all taxes due and owing by the estate had been paid.

therefore assume that we now have all the facts upon which the defenses of estoppel and laches are based and dispose of them in connection with our discussion of the Government's fiduciary responsibility (Part V, *infra*).

IV.

*The course of taxation of Osage restricted property*

To understand our analysis of the obligation of the United States (Part V, *infra*) and of the current status of *West* v. *Oklahoma Tax Comm'n, supra* (Part VI, *infra*), it will help to begin by setting out, descriptively, the history of the taxation by the United States and the states of Osage (and comparable) Indian restricted property.

A. With regard to that type of asset, as we have indicated the Osage Allotment Act, as amended, places it in trust and goes on to say (as spelled out in the 1947 amendment, 61 Stat. 747):

> That the Osage lands and funds and any other property which has heretofore or which may hereafter be held in trust or under supervision of the United States for such Osage Indians not having a certificate of competency shall not be subject to lien, levy, attachment, or forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency.

Earlier, the 1912 amendment, 37 Stat. 86, 88 had put it this way: "nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs * * *."[5]

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[5]A brief history of the pertinent changes in the Osage Allotment Act is given at *Big Eagle* v. *United States, supra*, 156 Ct. Cl. 665, 672-73, 300 F. 2d 765, 768-69 (1962).

In 1929 and 1938, Congress amended the Act (45 Stat. 1478-79, 52 Stat. 1034, 1035) to direct that the restricted mineral lands "and all royalties and bonuses arising therefrom shall belong to the Osage Tribe of Indians and shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law * * *."

B. For many years Indian trust or restricted property was considered immune from state taxation on various theories, the last being that such properties were "federal instrumentalities" and therefore exempt by constitutional implication. See *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 602-04 (1943).[6] This reasoning was rejected by the Supreme Court in its *Oklahoma Tax Comm'n* opinion, *supra*, 319 U.S. 598, 603, which then went on to consider whether immunity flowed from the Congressional restrictions on alienability and use. The case involved inheritance taxes imposed by Oklahoma on the transfer of the estates of members of the Five Civilized Tribes who held legal title to their property; the estates included restricted cash and securities under the supervision of the Secretary of the Interior. The Court held "that the restriction, without more, is not the equivalent of a congressional grant of estate tax immunity for the cash and securities" (319 U.S. at 602), finding that "(1) the legislative history of the Act [imposing the restriction] refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act" (319 U.S. at 604).

Five years later, this holding was applied to the very type of trust property now before us—Osage headrights (and funds derived therefrom) and shares of the Osage trust fund (derived from the Kansas lands) held in trust

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[6] At the same time, federal income and federal estate taxes seem to have been levied and collected with respect to much of this property (at least in the later years). See Part VI B, *infra*, and notes 8 and 13, *infra*.

by the United States for the Indians. *West* v. *Oklahoma Tax Comm'n, supra,* 334 U.S. 717 (1948). The Court "fail[ed] to see any substantial difference for estate tax purposes between restricted property and trust property. The power of Congress over both types of property is the same * * *. The effect which an estate or inheritance tax may have is the same in both instances; liens may be placed on both restricted and trust properties and lead to complications; and both types of property may of necessity be depleted to assure payment of the tax." 334 U.S. at 726. The Court refused to find any reason for immunity in the fact that the estate might "be tapped repeatedly by Oklahoma until 1984 [the end of the trust] by the deaths of the various heirs", and "the result may be a substantial decrease in the amount then available for distribution" 334 U.S. at 726, 727. The opinion also pointed out the distinction between estate or inheritance taxation and property taxes. "It is the transfer of these incidents [on death], rather than the trust properties themselves, that is the subject of the inheritance tax in question." 334 U.S. at 727. But the Court also noted that "should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however." 334 U.S. at 727-28.

c. The *West* opinion is the last word from the Supreme Court directly on point, but it is not the last word on Indian tax immunity. *Squire* v. *Capoeman,* 351 U.S. 1 (1956), concerned the right of the Internal Revenue Service to impose the federal income tax (capital gain tax) on sale of standing timber on land of a Quinaielt Indian (in the State of Washington) held in trust for him by the United States under the General Allotment Act. The Court held that the tax could not be levied.[7] First, the opinion looked favorably on the Indian's argument that immunity was implied by

[7]The prior assumption by the Internal Revenue Service appears to have been that the tax could be imposed. See Part VI, *infra.*

the Government's promise (in the General Allotment Act) to transfer fee title to the land (at the end of the trust) "free of all charge or incumbrance whatsoever." But the Court did not place its holding solely on that ground (351 U.S. at 6-7). It relied more heavily on a provision of the Allotment Act that after award of a patent to the allottee in fee simple "all restrictions as to sale, incumbrance, or taxation of said land shall be removed * * *." This was said to imply that, before transfer, the allotted land was to be free of all taxes. 351 U.S. at 7-9. The "wisdom of the congressional exemption from tax" was manifested, the Court thought, by the fact that unless the full proceeds of the timber sale were preserved for the Indian allottee he would not have the necessary chance of survival when declared competent and the trust ended. 351 U.S. at 10.

D. A year after *Squire* v. *Capoeman*—a federal income tax case—the Ninth Circuit held, on its authority, that the trust allotment of a California Mission Indian was not subject to state inheritance taxes. *Kirkwood* v. *Arenas*, 243 F. 2d 863 (C.A. 9, 1957). Although the Mission Indian Act did not contain the provision (in the General Allotment Act) relating to "taxation" on which the Supreme Court had mainly rested, the *Arenas* opinion considered that the two statutes were in *pari materia* and that the *Squire* decision controlled. Alternatively, the court ruled that the declaration in the Mission Act that the fee was to be transferred "free of all charge or incumbrance whatsoever" was sufficient by itself under the *Squire* theory.

In 1962, in *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F. 2d 765, this court refused, relying on *Squire*, to permit the federal income tax to be applied to income derived from Osage trust properties of the exact type now before us. Like the *Arenas* case, *supra*, we read the Osage Allotment Act in the same spirit, as understood by *Squire*, as the General Allotment Act—even though the former differed in terms from the latter, omitting not only the "taxation"

provision but also the "free of any charge or incumbrance" language. 156 Ct. Cl. at 676-78, 300 F. 2d at 770-72. Our opinion emphasized, as equivalent to the latter declaration, the amendments to the Osage legislation directing that "*all* royalties and bonuses arising therefrom [the Osage mineral lands] * * * *shall* be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law * * *" [emphasis added], pointed out the similarities and common purpose of the General Allotment and Osage Allotment Acts; and added that Congress could have, but did not, specifically legislate to impose the income tax on income from noncompetent Osage headrights.[8]

In the same year, the Tenth Circuit applied *Squire* to Quapaw Indians (who, like the Osages, had their own allotment Act), excepting federal income tax gain from restricted Indian lands. *United States* v. *Hallam*, 304 F. 2d 620 (C.A. 10, 1962). The next year, *Nash* v. *Wiseman*, 227 F. Supp. 552 (W.D. Okla. 1963), extended *Squire* to federal estate taxes on trust property of an Indian subject to the General Allotment Act. To the same effect is *Asenap* v. *United States*, 283 F. Supp. 566 (W.D. Okla. 1968). See, also, *United States* v. *Daney*, 370 F. 2d 791 (C.A. 10, 1966) (mineral lease bonus immune from federal income tax although statute provided for taxation of the minerals themselves).

E. In 1969 the Internal Revenue Service ruled (Rev. Rul. 69-164, 1969-1 Cum. Bull 220) that Indian trust properties held under the General Allotment Act were free of the federal estate tax. This ruling expressly follows *Squire*. By a Technical Advice Memorandum, August 15, 1969, to the District Director of Internal Revenue in Oklahoma City,

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[8]In 1930, before *Oklahoma Tax Commission* and *West*, the Tenth Circuit had held such income immune. *Blackbird* v. *Comm'r*, 38 F. 2d 976, 977-78. The rationale of this decision was disapproved in *Superintendent* v. *Commissioner*, 295 U.S. 418 (1935), but appears to have been revived in *Squire* v. *Capoeman*. See Part VI B, *infra*.

the Service announced that the principles of Rev. Rul. 69-164, *supra*, were also applicable to Osage restricted-property estates. The memorandum says: "In our analysis of the two allotment acts [General Allotment Act and Osage Allotment Act] and their legislative history we found no indications that Congress intended to treat the Osage Indians any different than any of the tribes covered by the General Allotment Act of 1887. On the contrary, the general tone of both acts, the nature of the responsibilities assumed by the United States, and the similarities and basic concepts (especially the basic concept of conserving the property for the incompetent) indicate a common congressional intent underlying both acts."

F. To summarize the bare bones of the taxable status of restricted Indian property since *Squire* v. *Capoeman* in 1956: (1) Such Osage property and its proceeds have been expressly held immune, by court decision or Internal Revenue Service ruling, from the federal income tax and the federal estate tax; (2) restricted property of other Indians subject to the General Allotment Act or comparable legislation has been held immune, in *Squire* or since, from the federal income tax, the federal estate tax, *and state death taxes;* and (3) in rulings involving federal taxes, the Osage Allotment Act has been said by this court and by the Internal Revenue Service to be on all fours with the General Allotment Act with respect to the immunity of restricted trust property from taxation. But since the *West* case in 1948, there has been no holding exactly on the precise issue now before us—the liability of such Osage property to state death taxation.

## V.

### *The Government's obligation as fiduciary*

This is a suit against the United States, not against the Oklahoma taxing authorities, and the United States did not receive the tax money. The burden of the petition, rather, is that the Federal Government breached its fiduciary obli-

gation by paying the Oklahoma estate tax, and is therefore liable under 28 U.S.C. § 1491 (our general jurisdictional statute) for this breach of trust.

A. One of the major defenses is that, whether or not *West* is still good law, the Osage Agency acted reasonably, in 1967 and 1968, in relying on it, and accordingly the Government did not violate any trust obligation to Rose Mason's estate or her heirs. We need not decide what the defendant's duty would have been if there had been no hint of the possible fallibility of *West*. For we are satisfied that, by 1967 and 1968 when the tax was handed over, the shadows on that decision loomed so large that the Government, as fiduciary with the obligation to protect the Indians, should have tested the current acceptability of *West* by challenging collection of the tax.

The history recounted in Part IV, *supra*, shows that by 1967 the Supreme Court had decided *Squire*, the rationale of which is at the least difficult to harmonize with the theory of *Oklahoma Tax Comm'n* and *West;* in *Big Eagle* this court had applied *Squire* to Osage restricted income, and still another court had done the same to an Indian group likewise not under the General Allotment Act; courts had also extended the *Squire* principles to state death and federal estate taxes, in litigation involving both General Allotment Act Indians and other Indians (not Osages) subject to other laws. The General Allotment Act, these other statutes, and the Osage Act had all been said to have the same effect with respect to taxability.

The Internal Revenue Service had not formally applied the *Squire* rationale to federal estate taxes (which it did on April 7, 1969 in Rev. Rul. 69-164, *supra*) but this ruling came so soon that it could and should have triggered a suit by the Government against the state for a refund. Moreover, the revenue ruling was foreshadowed by the defendant's settlement of *Beartrack* v. *United States*, Ct. Cl. No. 281-67. This was an action in this court for refund of federal

estate taxes paid with respect to restricted trust properties of an Osage decedent. The defendant settled by a full refund on October 25, 1968. This was about two months before the Osage Agency made its last payment to Oklahoma with respect to Rose Mason's estate.

From all this, the Department of the Interior would have to conclude, in our view, that there was at the very least a serious question whether *West* remained viable and that, as a fiduciary for Rose Mason and her estate, the United States would have to test that issue by protesting the payment of the tax and litigating its applicability.[9] Faced with the developments in the law since *West* in 1948, no trustee could properly decide the matter finally for itself, but would have to remit the question to an appropriate tribunal. See Bogert, *Trusts and Trustees* (2d ed. 1959), §§ 581 (at 207), 582 (at 216), 594 (at 288), 602 (at 386).

B. The Congressional directive in the Osage Allotment Act that the properties with which we are concerned be held by the Federal Government in trust for the noncompetent allottee (see 34 Stat. 539, 543 (§ 3), 544 (§ 4), 544-45 (§ 5); 37 Stat. 86, 88 (§ 7); 61 Stat. 747) necessarily implies that the Bureau of Indian Affairs must act as a trustee, and subject to the general limitation that a trustee must act for the benefit of his *cestui*, reasonably, in good faith, and not arbitrarily or in abuse of discretion. The defendant does not deny that the Bureau was under this obligation, and the implication of such a duty is firmly supported by our prior decisions in comparable circumstances. See *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 19-20 (1944); *Menominee Tribe* v. *United States*, 101

[9] In *Oklahoma Tax Comm'n* v. *United States*, *supra*, 319 U.S. 598, the Federal Government brought the suit to recover the inheritance taxes imposed by Oklahoma. See, also, IV Scott, *Trusts* (3d ed. 1967), § 280 (at 2327, 2328); *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369-70 (1968).

Ct. Cl. 22, 40 (1944); *Gila River Pima-Maricopa Indian Community* v. *United States*, 135 Ct. Cl. 180, 189, 140 F. Supp. 776, 780-81 (1956); *Oneida Tribe* v. *United States*, 165 Ct. Cl. 487, 493-94, *cert. denied*, 379 U.S. 946 (1964); *Seneca Nation* v. *United States*, 173 Ct. Cl. 917, 925 (1965); *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 507-08, 364 F. 2d 320, 322-23 (1966); *Sac and Fox Tribe* v. *United States*, 179 Ct. Cl. 8, 27, 383 F. 2d 991, 1001, *cert. denied*, 389 U.S. 900 (1967); *Gila River Pima-Maricopa Indian Community* v. *United States*, 190 Ct. Cl. 790, 797-98, 427 F. 2d 1194, 1198, *cert. denied*, 400 U.S. 819 (1970); *cf. Seminole Nation* v. *United States*, 316 U.S. 286, 296-97 (1942).[10] In this instance, as we have just indicated, we think that the Bureau did violate this duty by paying the tax without seeking an adjudication whether it was actually owed.

c. Defendant argues, however, that responsibility lay on the plaintiffs, as administrators of the estate, to bring suit to recover the tax. Apparently it was possible for plaintiffs to do so (see *West* v. *Oklahoma Tax Comm'n*, *supra*, 334 U.S. 717; *Nash* v. *Wiseman*, *supra*, 227 F. Supp. 552 (W.D. Okla., 1963); *cf. Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968)), but they point out that they had nothing to do with the filing of the state estate tax return or the payment of the tax, and that the formal assessment of the tax by the Oklahoma Tax Commission was not filed in the County Court (the probate tribunal) until December 1968, and accordingly they did not receive formal notice of the

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[10] "* * * this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. * * * Under a humane and self imposed policy which has found expression in many acts of Congress [footnote omitted] and numerous decisions of this Court, it [the Federal Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." 316 U.S. at 296-97.

payment until that time—some seven months after their original discharge as administrators.[11]

Even if plaintiffs should have surmised that the state's levy had been paid (see note 11, *supra*), we do not believe their only remedy was to file suit against the state in their own behalf. The United States was the trustee, and it had the primary responsibility to act. A *cestui* or ward is not limited to pursuit of a third party where the trustee has paid over money improperly to that third party. The injured *cestui* can bring action against the trustee to rectify the wrong. See IV Scott, *Trusts* (3d ed. 1967) § 279 A (at 2321).

Defendant also raises the specter of estoppel and laches, but neither can be shown here. This suit was begun less than two years after formal notice of the state assessment, and the United States is not precluded by limitations from suit over against the State of Oklahoma (see Part VII, *infra*). The administrators may have failed to protest the payment, but they were under no obligation to do so, especially in the absence of any notification by the Osage Agency that the money was to be handed over to the state. As we have held above (Part III, *supra*), plaintiffs were under no duty to exhaust administrative remedies before filing this action. Similarly, their omission to spur the Bureau of Indian Affairs to refuse to pay, or seek a refund, does not create an estoppel. The defendant was primarily responsible. IV Scott, *op. cit., supra.*

D. A suit against the United States on behalf of the estate of a non-competent Indian, for damages compensating the estate for breach by the Government of its trust

[11]The County Court was not asked to pass upon the propriety of paying the estate tax; the formal declaration in the final decree that "all taxes" were paid does not mean that the Osage Agency presented the estate tax matter to the probate court before payment. Defendant admits that the Osage Agency did not advise plaintiffs or their attorneys of the payment of the tax, but assumes that the local attorneys, who were knowledgeable in the field, must have known it would be paid.

obligation under a federal statute, is within 28 U.S.C. § 1491 as a claim founded upon an Act of Congress and for damages "in cases not sounding in tort." The Osage Allotment Act implies that, if the Government breaches its trust duty to the pecuniary disadvantage of a non-competent Osage allottee, due compensation will be paid by the United States. See *Ralston Steel Corp.* v. *United States*, 169 Ct. Cl. 119, 125-26, 340 F. 2d 663, 667-68, *cert. denied*, 381 U.S. 950 (1965); *Eastport S.S.* v. *United States*, 178 Ct. Cl. 599, 605-06, 372 F. 2d 1002, 1007-08 (1967). *Cf. Seminole Nation* v. *United States*, *supra*, 316 U.S. 286, 297, 300, 307-08 (1942); *Menominee Tribe* v. *United States*, *supra*, 101 Ct. Cl. 10, 20-21 (1944); *Menominee Tribe* v. *United States*, *supra*, 101 U.S. 22, 40-41 (1944); *Navajo Tribe* v. *United States*, *supra*, 176 Ct. Cl. 502, 509-10, 364 F. 2d 320, 322-23 (1966); *Hebah* v. *United States*, 192 Ct. Cl. 785, 428 F. 2d 1334 (1970).

E. There remains the problem of the damages for the Government's breach of its obligation to test the applicability of the Oklahoma tax. If the tax was validly imposed, plaintiffs suffered no monetary damage from the defendant's dereliction. On the other hand, if the tax was not owing, plaintiffs suffered more than a nominal wrong and are entitled to an appropriate remedy. Since the pecuniary injury was the amount of the invalid payment from the trust monies, the estate should recover that sum. It is plain to us, therefore, that in order to render a proper judgment in this litigation we must reach and decide the legality of the tax.

## VI.

*The current standing of West v. Oklahoma Tax Commission*

Appraisal of the applicability of the tax necessarily thrusts us into an inquiry on the current status of *West* v. *Oklahoma Tax Comm'n*, *supra*, 334 U.S. 717 (1948). For an inferior tribunal this is a most delicate undertaking. It goes without saying that we cannot refuse or fail to follow a

Supreme Court decision, directly in point, because we disagree with its reasoning or think it erroneous. See, *e.g.*, *McCorkle* v. *The First Pennsylvania Banking & Trust Co.*, C.A. 4, decided April 20, 1972 (Sobeloff J.), 40 LW 2725. But our responsibility differs where there have been significant developments—in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court's decision have been seriously weakened or eroded. If that is so, a lower court can properly, without disrespect or flouting authority, make the judgment, in due care and circumspection, that the Court will no longer follow its earlier holding. *See, e.g., Barnette* v. *West Virginia State Board of Ed.*, 47 F. Supp. 251, 252-53 (S.D. W. Va. 1942) (Parker J.), *aff'd*, 319 U.S. 624 (1943); *United States* v. *Girouard*, 149 F. 2d 760, 765-67 (C.A. 1, 1945) (Woodbury J., dissenting), *rev'd*, 328 U.S. 61 (1946); *Andrews* v. *Louisville & Nashville R.R.*, 441 F.2d 1222 (C.A. 5, 1971), *aff'd*, U.S. Sup. Ct., No. 71-300, decided May 15, 1972, 40 LW 4511.

The history in Part IV, *supra*, shows, in our view, that there has been just such a significant development with respect to *West*—beginning with *Squire* v. *Capoeman*, 351 U.S. 1, in 1956. There has been a marked change in the evaluation of the reasons given by the Court for its result in *West* (and the precursor, *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598 (1943)), and there has also been a considerable increase in the kinds of taxes with respect to which restricted Indian property has been held immune. In several crucial aspects the essential bases of *West* have been so weakened that, in our opinion, the decision no longer stands as authoritative.

A. Following the lead of *Oklahoma Tax Comm'n* v. *United States*, *supra*, the *West* opinion put aside as immaterial the facts that, if the tax was leviable, Oklahoma could impose a lien on the property (334 U.S. at 725) and the estate could be much depleted through successive pay-

ments of state death taxes before the end of the trust period (334 U.S. at 725-26, 727). *Squire* took the opposite positions that (1) provision in an allotment statute that the property was to be transferred, at trust end, free of all charge or incumbrance "might well be sufficient" to bar taxation (351 U.S. at 6-7), and (2) it is necessary to preserve the property wholly intact for the Indian—including immunity from taxation—so that he can "go forward when declared competent with the necessary chance of economic survival in competition with others" (351 U.S. at 10).

Again, *West* demanded affirmative indications by Congress "that these burdens require that the transfer be immune" from tax liability (334 U.S. at 727). See also *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 604, 606, 607, 609. *Squire*, reversing the presumption, considered these burdens so important that Congress should affirmatively authorize taxibility if the desire was to permit it.

Thus, both of the main foundations for *West* (and *Oklahoma Tax Commission*) were disavowed in *Squire* v. *Capoeman*. It is this latter approach which has been uniformly applied in the subsequent lower court cases and administrative rulings referred to in Part IV, *supra*. The *West-Oklahoma Tax Commission* attitude has been silently dropped, and its reasoning no longer utilized. As their texts reveal, those two opinions were the yield of a period in which the Supreme Court was intent on doing away with the various forms of intergovernmental tax immunity, and Indian tax exemption had been supported on that theoretical basis. For at least the last fifteen years, the judicial climate has changed to concentrate, not on the relationship of Indian tax immunity to other exemptions, but on the particular social goals Congress has sought to reach through its restrictions on Indian properties.

B. It seems clear, too, that in deciding *Oklahoma Tax Comm'n* and *West*, the Supreme Court thought (at that time) that restricted Indians were subject to both federal

income and estate taxes with respect to restricted and trust property—and that this was an important factor in the decisions. The *Oklahoma Tax Commission* opinion indicates this very plainly. 319 U.S. at 601, 608, including fn. 12 (relating to the federal estate tax). The Court referred (at 601) to *Superintendent* v. *Commissioner*, 295 U.S. 418, as broadly holding "that the restricted income of Indians was subject to the federal income tax" (see note 8, *supra*), and observed (319 U.S. at 608): "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes."[12]

In *West*, the briefs before the Supreme Court show that the Oklahoma Tax Commission (the appellee) stressed that Osage trust properties were then subject to both federal income tax and federal estate tax; as to the latter, the brief included a letter from the Commissioner of Internal Revenue saying that federal estate taxes were being imposed on and collected from estates of restricted Osage Indians.[13] West's brief did not dispute this assertion.

Today the situation is very different. *Squire* distinguished *Superintendent* v. *Commissioner, supra*—despite its unqualified language—as limited to reinvestment income (351 U.S. at 9), and held direct, initial income of those restricted Indians nontaxable. Income from Osage

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[12]The brief for the United States, on behalf of the Indians, in *Oklahoma Tax Commission* expressly agreed that the federal estate tax was applicable.

[13]The Service limited this determination to estates of Indian decedents dying after June 25, 1940, when it was decided to impose the tax on this type of estate.

The vagaries of federal income taxation of restricted Indian income are recited in the Supplemental Memorandum for the Petitioner, in *Squire* v. *Capoeman*, US. Sup. Ct., Oct. Term 1955, No. 134. At the time of *West* and *Oklahoma Tax Commission* it appears that the tax was being collected under an opinion of the Attorney General holding it applicable. See, also, *Squire*, 351 U.S. at 8-9.

properties of the kind now at stake has been specifically held not subject to federal income tax. *Big Eagle* v. *United States, supra,* 156 Ct. Cl. 665, 300 F. 2d 765 (1962). And the Internal Revenue Service has ruled that this property is likewise immune from the federal estate tax (see Part IV, *supra*). The demand for equal treatment of state and federal taxes, which seemed to move the Court in *Oklahoma Tax Commission* and *West*, now works the other way—against taxibility.[14]

c. Though *Squire* dealt with the General Allotment Act and the Osage statute contains different wording, the developments since *Squire* have shown that no distinction should be made on the basis of the particular language of the various pieces of Indian allotment legislation. The lower courts have applied the *Squire* principles to Indians not covered by the general act (*Kirkwood* v. *Arenas; Big Eagle* v. *United States; United States* v. *Hallam*), and the Internal Revenue Service has used them for the Osages (Technical Advice Memo, Aug. 15, 1969). See Parts IV and V A, *supra*. As both this court (in *Big Eagle*) and the Revenue Service have said, the terms of the Osage Allotment Act (see Part IV A, *supra*) are sufficiently close to those of the General Allotment Act to require the same approach and the same reading.[15]

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[14]In *Landman* v. *United States*, 103 Ct. Cl. 199, 209-10, 58 F. Supp. 836 (1945), this court indicated that property exempt from state estate taxes was also necessarily exempt from the federal estate tax; and in the decision which led to *West* the Supreme Court of Oklahoma considered that state and federal immunity or lack-of-immunity was correlative. *Yarbrough* v. *Oklahoma Tax Comm'n*, 200 Okla. 402, 193 P. 2d 1017, 1020-21 (1947), *aff'd*, 334 U.S. 841 (1948).

[15]In particular, the portions of the Osage Act which forbid trust assets from being "subject to lien, levy, attachment, or forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency", and provide that "all royalties and bonuses arising therefrom [the Osage mineral lands] • • • shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law."

D. Nor can we properly distinguish *Squire* as involving an income tax, not a death levy. *West*, it is true, does differentiate death taxes from property taxes as "imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits" (334 U.S. at 727). This dissimilarity seems to have been noted solely in connection with that taxpayer's argument that there was a difference between the Indian-owned-but-restricted property in *Oklahoma Tax Commission* and the United States-owned-trust property in *West;* the Supreme Court uses the incidence of the estate tax to show that the difference from *Oklahoma Tax Commission* was not meaningful in the context of tax immunity.

In any event, the *Squire* rationale, rather than this distinction in *West*, has been carried over to death taxes by the Internal Revenue Service (for federal estate taxes)[16] and by lower courts (for both federal and state death taxes). See Part IV, *supra*. We, too, see no reason for carving out estate and inheritance taxes for separate treatment. The *Squire* principles—especially the warning against diminution of restricted assets through payment of taxes—apply at least equally, perhaps even more, to death levies with their possible successive and cumulative impact before the restriction ends.

E. *Squire* related, of course, to a federal tax, and we are now concerned with a state impost, but that does not make the *Squire* reasoning irrelevant. As we have pointed out, the same factors which influenced the Court to find immunity from the federal income tax in the allotment legislation are present for death taxes, state or federal. The Internal Revenue Service has agreed for the federal estate tax. It is clear that Congress has the power to immunize

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[16]Defendant's brief says candidly that "Revenue Ruling 69-164 [see Part IV, *supra*] has the appearance of being contrary to the decision of the Supreme Court in *West*." There is, however, no suggestion that the ruling is being (or has been) repudiated.

these restricted properties from state levies.[17] *Cf. Warren Trading Post Co.* v. *United States*, 380 U.S. 685 (1965); *Williams* v. *Lee*, 358 U.S. 217 (1959). And it would be strange and uncharacteristic for Congress to withhold the federal estate tax (on the ground it could deplete the corpus) but to authorize the comparable state levy.

However, a statement in *Oklahoma Tax Commission* is stressed—"If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our National policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state." 319 U.S. at 609. That observation was probably made in the belief that federal income and estate taxes were collectible (see Part VI B, *supra*), an assumption no longer so. Moreover, Oklahoma does not now appear to be singled out; since *Squire*, other states inhabited by Indians with restricted property are no doubt under the same disability. See *Kirkwood* v. *Arenas*, *supra*, 243 F. 2d 863 (C.A. 9, 1957) (California inheritance tax).[18]

F. At the end of the *West* opinion, the Court appends the unelaborated remark that *Oklahoma Tax Commission* "makes clear that should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however." 334 U.S. at 727-28. When it adopted those sentences, the Court, in all probability, considered the Osage trust properties to be subject to federal income tax (Part VI B, *supra*), and that may have been the reason why it thought no properties

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[17]No argument is made by the defendant or Oklahoma that Congress is without power to exempt such Indian estates from state taxation.

[18]In quite different contexts, the Osage Allotment Act contains a few express provisions for taxation by the state. It is not argued that any of these apply to the estate tax as involved here, and we are satisfied that they do not.

exempt from direct taxation were there involved. The income tax is often characterized as a "direct tax" (that is why the Sixteenth Amendment had to be adopted, *cf. Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429, 158 U.S. 601 (1895)). Currently, however, income from Osage trust property is exempt. The final qualification in *West* may therefore have become effective to remove the restricted property from the state tax even under the *West* opinion itself.[19]

G. On these grounds, we feel compelled to conclude that, because of the developments from *Squire* on, the *West* result is no longer controlling on us, and the opposite holding is mandated here. This leads directly to our ruling that the state tax was not owed, and that plaintiffs are entitled to recover from the United States for its breach of fiduciary duty in paying the tax when it should not. We may turn out to be mistaken, but the decision we make is the one we believe would be "the event of an appeal in the case before us" (Judge Learned Hand, dissenting in *Spector Motor Service, Inc.* v. *Walsh*, 139 F.2d 809, 823 (C.A. 2, 1943)).[20]

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[19]On the other hand, the Court may possibly have meant to include only property which is immune from direct property taxation (see *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 610-11). Congress has expressly authorized Oklahoma to collect a gross production tax on minerals, before the headright pro-rata income distribution is made. Acts of March 3, 1921, 41 Stat. 1249, and of April 25, 1940, 54 Stat. 168. Perhaps the Court considered this tax as showing that the involved properties had not been exempted by Congress from direct taxation.

Since defendant sees this production tax as somehow supporting the imposition of the state death tax, we note that we cannot infer from an express and limited grant of power to tax a more general and unlimited right which is unexpressed.

[20]Judge Hand said:

"It is always embarrassing for a lower court to say whether the time has come to disregard decisions of a higher court, not yet explicitly overruled, because they parallel others in which the higher court has expressed a contrary view. I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not

VII.

*Oklahoma's liability to the United States*

If, as we have just held, the Oklahoma estate tax should not have been paid or collected with respect to this Indian trust and restricted property, the state is liable over to the United States, which, as trustee, improperly paid the tax. As trustee, the United States can sue for return of the money. See IV Scott, *Trusts* (3d ed. 1967) §§ 279A (at 2321), 280.5 (at 2327, 2328); *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369-70 (1968). The Federal Government expressly asks for such recovery over, and there is no barrier to grant of that prayer. The state statute of limitations does does not run against the United States, whether suing on behalf of Indians or otherwise. See *Board of Commissioners* v. *United States*, 308 U.S. 343, 351 (1939); *United States* v. *Summerlin*, 310 U.S. 414 (1940); *United States* v. *John Hancock Mut. Ins. Co.*, 364 U.S. 301, 308 (1960). Nor is the Government's claim for recovery required to be brought in the state court; it may be instituted, as here, in a federal court. *Cf. Oklahoma Tax Comm'n* v. *United States*, *supra*, 319 U.S. 598 (1943); *Poafpybitty* v. *Skelly Oil Co.*, *supra*.

CONCLUSION

Plaintiffs are entitled to recover from the defendant, their motion for summary judgment is granted, and the defendant's motion is denied as against the plaintiffs. The United States, in turn, is entitled to recover the full amount of the judgment from the State of Oklahoma, third-party defendant, and accordingly the defendant's motion for sum-

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[20] (Continued)

choose to appeal. In either event the actual decision will be one which the judges do not believe to be one which the higher court would make. • • • Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it."

mary judgment for such relief is granted. The amount of recovery by plaintiffs against defendant and by defendant against third-party defendant will be determined under Rule 131(c).

SKELTON, *Judge*, dissenting:

I think the majority has fallen into error in refusing to follow the decision of the Supreme Court in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948), which it admits involved the identical problem we have in the instant case and is the only decision of that Court that has ever decided the exact question we have before us. That case has never been overruled and the law under which it was decided has not been changed. Consequently, we are required to follow it. Furthermore, it was correctly decided, as will be shown below.

The *West* case involved the power of the State of Oklahoma to levy an inheritance tax on the estate of a deceased restricted (noncompetent) Osage Indian which is the exact question before us in the instant case. The Court held in no uncertain terms that the State of Oklahoma did have such power and the tax was legal because it was a tax on the *transfer* of the property of the noncompetent Indian after his death and not a tax on the trust property itself. The Court said:

> * * * An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60; *Whitney* v. *Tax Commission*, 309 U.S. 530, 538. In this case, for example, the decedent had a vested interest in his Osage headright; and he had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. It is the transfer of these incidents, rather than

the trust properties themselves, that is the subject of the inheritance tax in question. In this setting, refinements of title are immaterial. Whether legal title to the properties is in the United States or in the decedent and his heir is of no consequence to the taxability of the transfer.

The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the *Oklahoma Tax Commission* case permits that liability to be imposed. * * * [*Id.* at 727.]

As may be seen from the foregoing, the decision is squarely in point, not only on the law question in our case, but also on the facts, as both cases involve the same kind of property of Osage Indians and the same kind of inheritance tax levied by the State of Oklahoma. The majority opinion admits all of this, but refuses to follow the *West* decision. Instead it questions the viability of the *West* case and relies on the decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), and the decisions of various inferior courts.

The *Capoeman* case is clearly distinguishable from the *West* case on both the facts and the law. That case involved the question of whether or not the Federal Government could levy an income tax on the income of living noncompetent Quinaielt Indians derived from the sale of timber cut from lands held in trust for them by the government under the provisions of the General Allotment Act of 1887 (24 Stat. 388, 25 U.S.C. § 331 *et seq.*). The Court held the income tax on the proceeds of the sale invalid. In doing so, it quoted with approval an opinion of an attorney general as follows:

"* * * In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." [Footnote omitted.] [*Id.* at 8.]

In that case, the court was dealing with a *direct tax* on the property of a *living noncompetent* Indian, and no inheritance tax imposed by a state was involved. Furthermore, the tax was being imposed on the property of the wards by their guardian during their lifetime. No such facts existed in *West* nor do they exist in our case.

The Court in *Capoeman* showed clearly that it was protecting the property of the noncompetent Indians during their lifetime so that when they became competent their property would not be depleted and they could take their rightful place in society. This is clearly shown by the following statements of the Court:

* * * The purpose of the allotment system was to protect the Indians' interest and "to prepare the Indians to take their place as independent, qualified members of the modern body politic." * * * [*Id.* at 9.]

* * * Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward *when declared competent* with the necessary chance of economic survival in competition with others. * * * [Emphasis supplied.] [*Id.* at 10.]

In the case at hand, we are not dealing with a living noncompetent Indian who may someday be declared competent and at that time will need to have his property intact so that he can make his own way in our economic society. Here we are dealing with a deceased noncompetent Indian whose noncompetency died with her. All of her property has already been transferred and distributed to her heirs, who, as far as the records show are competent and are not restricted in any way. The Oklahoma tax was levied on the transfer and distribution of the property of the deceased

Indian to her heirs. This is exactly the kind of a tax that the *West* decision held to be valid.

The majority discusses other decisions of lower courts and a Revenue Ruling of the Internal Revenue Service to the effect that trust funds of Indians are not subject to Federal income tax or estate taxes. These authorities are not in point because taxes of that kind are not involved here. Furthermore, as the Supreme Court pointed out in *Capoeman*, the ward cannot be taxed by the guardian. The majority notes a few cases of lower courts that Indian trust property is not subject to state inheritance taxes. If those cases involve different Indians whose property is held in trust under different Acts of Congress to the Osage Allotment Act here involved, they are not in point. If they involve the same facts and the same legal questions we have in the instant case, they are in direct conflict with the decision of the Supreme Court in the *West* case and are not controlling. For all of these reasons, I have not discussed them individually.

From the foregoing, it is readily apparent that the *West* decision is viable and controlling, and we are not free to question its viability. Neither do we have the power or authority to overrule it by relying on decisions of lower courts nor by speculating on what the Supreme Court might do sometime in the future if this question should again be presented to it.

I would deny plaintiffs' motion for summary judgment and grant that of the defendant, and dismiss plaintiffs' petition.

## APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1947

*MARY MORTON WEST, Osage Allottee No. 192,
Appellant,

v.

OKLAHOMA TAX COMMISSION

(334 US 717-728.)

SUMMARY

See headnote 1.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Succession Taxes, § 15—what taxable—property held in trust by United States for Osage Indians.

1. The state of Oklahoma may constitutionally levy an inheritance tax in respect of property held in trust by the United States for the benefit of a restricted Osage Indian which upon his death descended to his heirs subject to the terms of the statutory trust.

Taxes, § 85—what taxable—Federal property.

2. Property of the United States is immune from any form of state taxation unless Congress expressly consents thereto. This immunity grows out of the supremacy of the Federal government and the necessity that it be able to deal with its own property free from any interference or embarrassment that state taxation might impose. (Arguendo)

Succession Taxes, § 2—nature.

3. An inheritance or estate tax is not levied on the property of which an estate is composed, but upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits.

[*See annotation references*, 1 and 2.]

[APPENDIX]

[No. 489.]

Argued March 29 and 30, 1948. Decided June 14, 1948.

APPEAL by the sole heir of a restricted Osage Indian from a judgment of the Supreme Court of the State of Oklahoma affirming the action of the State Tax Commission in levying an inheritance tax in respect of property held in trust by the United States for the decedent. Affirmed.

See same case below, 199 Okla —,193 P2d 1017.

Frank T. McCoy, of Pawhuska, Oklahoma, argued the cause, and, with John T. Craig and John R. Pearson, also of Pawhuska, Oklahoma, and Frank Mahan, of Fairfax, Oklahoma, filed a brief for appellant:

The decision below is legally erroneous and in irreconcilable conflict with prior decisions of this court and other Federal courts. See Taylor v. Tayrien (CCA10th Okla) 51 F2d 884; McCurdy v. United States, 264 US 484, 68 L ed 801, 44 S Ct 345; Adams v. Osage Tribe of Indians (DC) 50 F2d 918; Adams v. Osage Tribe of Indians (CCA10th Okla) 59 F2d 653, cert den 287 US 652, 7 L ed 563, 53 S Ct 116; United States v. Thurston County (CCA8th) 143 F 287; McKnight v. Panther, 190 Okla 127, 120 P2d 973.

Indian property held in trust by the United States is constitutionally exempt from state taxation. United States v. Rickert, 188 US 432, 47 L ed 532, 23 S Ct 478; McCurdy v. United States, 264 US 484, 68 L ed 801, 44 S Ct 345; United States v. Thurston County (CCA8th) 143 F 287. See also Mahnomen County v. United States, 319 US 474, 87 L ed 1527, 63 S Ct 1254; United States v. Fremont County (CCA10th Wyo) 145 F2d 329. Cf. United States v. Mummert (CCA8th) 15 F2d 926.

## ANNOTATION REFERENCES

1. On nature of inheritance tax, generally, see annotation in 33 LRA NS 606.

2. On validity, operation, and effect of inheritance and succession taxes, see annotation in 42 L ed 1037.

The imposition of the tax in controversy would interfere with the government's duty to the Osage Indians by diminishing the trust estate. Cf. Re Denison (DC Okla) 38 F2d 662, 15 Am Bankr NS 455; United States v. Osage County (CC Okla) 193 F 485; United States v. Osage County (CCA8th) 216 F 883, 886. Cf. also Choate v. Trapp, 224 US 665, 56 L ed 941, 32 S Ct 565; Carpenter v. Shaw, 280 US 363, 74 L ed 478, 50 S Ct 121; United States v. Ferry County (DC Wash) 24 F Supp 289.

So far as the corpus of the trust property is concerned, all the restricted Osage Indian has, and all he passes on to his heirs, is the right to certain income from the trust estate so long as the property continues to be held in trust by the Federal government. McCurdy v. United States, 246 US 263, 62 L ed 706, 38 S Ct 289.

Not only the distribution of the surplus but likewise distribution of the income from the tribal property is subject to the will of Congress.

So far as the nature of the tax is concerned, whether ad valorem or excise, the principle is the same if the power to levy the tax is wanting.

R. F. Barry, of Oklahoma City, Oklahoma, and Joe M. Whitaker, of Eufaula, Oklahoma, argued the cause, and, with C. W. King, also of Oklahoma City, Oklahoma, filed a brief for appellee:

The title of a restricted Osage in his properties is for all practical purposes the same as that of a restricted member of the Five Civilized Tribes. The tax here sought to be imposed (an estate tax), is an excise tax. The tax is im-

posed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. It is not levied on the property of which an estate is composed. Re Whitson, 88 Okla 197, 212 P 752; Landman v. Commissioner (CCA10th) 123 F2d 787; McGannon v. State, 33 Okla 145, 124 P 1063, Ann Cas 1914B 620; 28 Am Jur 12, Inheritance, Estate, Succession, and Gift Taxes, § 10.

The imposition of an estate tax would not interfere with the government's duty to the Osages by diminishing the trust estate. See Blackbird v. Commissioner (CCA10th) 38 F2d 976; Landman v. Commissioner (CCA10th) 123 F2d 787; New York v. United States, 326 US 572, 90 L ed 326, 66 S Ct 310; Oklahoma Tax Commission v. United States, 319 US 598, 87 L ed 1612, 63 S Ct 1284; Superintendent of Five Civilized Tribes v. Commissioner, 295 US 418, 79 L ed 1517, 55 S Ct 820; United States v. Osage County (CC Okla) 193 F 485.

The tax imposed is an excise tax imposed upon the shifting of economic benefits and the privilege of transmitting and receiving these benefits. Commissioner v. Holmes, 326 US 480, 90 L ed 228, 66 S Ct 257; Globe Indem. Co. v. Bruce (CCA10th Okla) 81 F2d 143; Graves v. Elliott, 307 US 383, 83 L ed 1356, 59 S Ct 915; Graves v. Schmidlapp, 315 US 657, 86 L ed 1097, 62 S Ct 870, 141 ALR 948; Re Martin, 183 Okla 177, 80 P2d 561; Whitney v. State Tax Commission, 309 US 530, 84 L ed 909, 60 S Ct 635; Title 25, § 26, Subsections 1, 2, 3 and 4, OS 1941; Title 68, § 989e, Subsection (3), OS 1941.

*Mr. Justice Murphy delivered the opinion of the Court.

Headnote 1

This appeal concerns the power of the State of Oklahoma to levy an inheritance tax on the estate of a restricted Osage Indian. Specifically, the problem is whether property held in trust by the United States for the benefit of the Indian may be included within the taxable estate.

Charles West, Jr., was a restricted, full-blood, unallotted, adult Osage Indian. He died intestate in 1940, a resident of Oklahoma. No certificate of competency was ever issued to him. Surviving him was his mother, appellant herein, who is a restricted, full-blood Osage Indian. The entire estate passed to her as the sole heir at law.[1]

The Oklahoma Tax Commission entered an order levying a tax on the transfer of the net estate, valued at $111,219.18. With penalties, the total tax imposed was $5,313.35. Appellant made timely objection to the inclusion of certain items in the taxable estate. These items formed the bulk of the estate and had been held in trust for the decedent by the United States, acting through the Secretary of the Interior. Act of June 28, 1906, 34 Stat 539, c 3572, as amended [March 3, 1921] 41 Stat 1249, c 120, [March 2, 1929] 45 Stat 1478, c 493, [June 24, 1938] 52 Stat 1034, c 645. The trust properties involved were as follows:

(1) One and 915/2520ths Osage mineral headrights. This item represented the decedent's undivided interest in the oil, gas, coal and other minerals under the lands in Osage County, Oklahoma, said minerals having been reserved to the use of the Osage Tribe by the Act of June 28, 1906.[2]

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[1]The decedent was also survived by a widow. But she was prohibited by law from inheriting any part of the estate unless she was of Indian blood, a matter which was in dispute. A settlement was reached whereby the widow received a certain amount from the estate, apparently in return for giving up her claim as an heir.

[2]An Osage headright has been defined by one court as "the interest that a member of the tribe has in the Osage tribal trust estate, and the trust consists of the oil, gas, and mineral rights, and the funds which were placed to the credit of the Osage tribe, all fully set out in the above act [Act of June 28, 1906, 34 Stat. 539, c 3572]." Re Denison (DC Okla) 38 F2d 662, 664, 15 Am Bankr NS 455. Another court has made this definition: "The right to receive the trust funds and the mineral interests at the end of the trust period, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estates

(2) Surplus funds in the United States Treasury, representing accruals of income to the decedent from the headrights.

(3) Stocks and bonds purchased by and in the name of the United States and held for the decedent by the Secretary of the Interior. These purchases were made with the surplus funds accruing from the headrights.

(4) Trust funds in the hands of the Treasurer of the United States, representing decedent's share of the proceeds of the sale of the Osage Tribe's lands in Kansas.

(5) Personal property purchased with surplus funds.

Appellant claimed that these properties were immune from state taxation by virtue of the relevant provisions of the Constitution, treaties and laws of the United States; hence the Oklahoma Inheritance and Tranfer Tax Act of 1939 (§§ 989-989t, title 68, Okla Stat 1941) which authorized the assessment on the properties was invalid in this respect. The Oklahoma Tax Commission rejected this contention and the Supreme Court of Oklahoma affirmed. 200 Okla —, 193 P2d 1017.

It is essential at the outset to understand the history and nature of the arrangement whereby the United States holds in trust the properties involved in this case. See Cohen, Handbook of Federal Indian Law (1945) 446-455. In [July 19] 1866, the United States and the Cherokee Nation of Indians executed a comprehensive treaty covering their various relationships. 14 Stat 799. It was there agreed that the United States might settle friendly Indians in certain areas of Cherokee territory, including what is now

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[2] (Continued)

and the interest on the trust funds, is an Osage headright." Globe Indem. Co. v. Bruce (CCA10th Okla) 81 F2d 143, 148, 149. Headrights are not transferable and do not pass to a trustee in bankruptcy. Taylor v. Tayrien (CCA10th Okla) 51 F2d 884; Taylor v. Jones (CCA10th Okla) 51 F2d 892, 18 Am Bankr NS 640.

Osage County, Oklahoma; these areas had previously been conveyed by the United States to the Cherokees. The treaty further provided that the areas in question were to be conveyed in fee simple to the tribes settled by the United States "to be held in common or by their members in severalty as the United States may decide."

The Osage Indians subsequently moved to the Indian Territory and settled in what is now Osage County. In 1883, pursuant to the 1866 treaty, the Cherokees conveyed this area to the United States "in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians." It is significant that fee simple title to the land was not conveyed at this time to the Osages; instead, the United States received that title as trustee for the Osages. Nor was any distinction here made between the land and the minerals thereunder, legal title to both being transferred to the United States.

On June 28, 1906, the Osage Allotment Act, providing for the distribution of Osage lands and properties, became effective. 34 Stat 539, c 3572. See Levindale Lead & Zinc Co. v. Coleman, 241 US 432, 60 L ed 1080, 36 S Ct 644. Provision was there made for the allotment to each tribal member of a 160-acre homestead, plus certain additional surplus lands. These allotted lands, said § 7, were to be set aside "for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided." The homestead was to be inalienable and nontaxable for 25 years or during the life of the allottee. The surplus lands, however, were to be inalienable for 25 years and nontaxable for 3 years, except that the Secretary of the Interior might issue a certificate of competence to an adult, authorizing him to sell all of his surplus lands; upon the issuance of such a certificate, or upon the death of the allottee, the surplus lands were to become immediately taxable. Section 2, Seventh; Choteau v. Burnet, 283 US 691, 75 L ed 1353, 51 S Ct 598.

Section 3 of the Act stated that the minerals covered by these lands were to be reserved to the Osage Tribe for a period of 25 years and that mineral leases and royalties were to be approved by the United States. Section 4 then provided that all money due or to become due to the tribe was to be held in trust by the United States for 25 years;[3] but these funds were to be segregated and credited pro rata to the individual members or their heirs, with interest accruing and being payable quarterly to the members. Royalties from the mineral leases were to be placed in the Treasury of the United States to the credit of the tribal members and distributed to the individual members in the same manner and at the same time as interest payments on other moneys held in trust. In this connection, it should be noted that quarterly payments of interest and royalties became so large that Congress later limited the amount of payments that could be made to those without certificates of competence; provision was also made for investing the surplus in bonds, stocks, etc.[4]

According to § 5 of this 1906 statute, at the end of the 25-year trust period "the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the indi-

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[3]The trust under which these funds were to be held was established in [Sept. 29] 1865 by treaty between the United States and the Great and Little Osage Indians, 14 Stat 687. By the terms of this treaty, the proceeds of the sale of Osage lands in Kansas were to be placed in the United States Treasury to the credit of the tribe. Provisions for carrying out the terms of this treaty were made by Congress in [June 16] 1880, 21 Stat 291, c 251.

[4]By the Act of March 3, 1921, 41 Stat. 1249, c 120, Congress provided that so long as the income should be sufficient the adult Osage Indian without a certificate of competency should be paid $1,000 quarterly. See also Act of Feb. 27, 1925, 43 Stat 1008, c 359. In the Act of June 24, 1938, 52 Stat 1034, c 645, it was provided that where the restricted Osage had surplus funds in excess of $10,000 he was to be paid $1,000 quarterly, but if he had surplus funds of less than $10,000 he was to receive quarterly only his current income, not to exceed $1,000 quarterly.

vidual members of the Osage tribe, according to the role herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interests, except as hereinbefore provided." It was also stated in § 2, Seventh, that the minerals upon the allotted lands "shall become the property of the individual owner of said land" at the expiration of 25 years, unless otherwise provided by Congress.

Moreover, § 6 provided that the lands, moneys and mineral interests of any deceased member of the Osage Tribe "shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma." Congress subsequently provided, in § 8 of the Act of April 18, 1912, 37 Stat 86, 88, c 83, that any adult member of the tribe who was not mentally incompetent could by will dispose of "any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed," in accordance with the laws of the State of Oklahoma. Such wills could not be probated, however, unless approved by the Secretary of the Interior before the death of the testator.

The 25-year trust period established by the 1906 statute has been extended several times by Congress, first to 1946 (41 Stat 1249, c 120), then to 1958 (45 Stat 1478, c 493), and finally to 1984 (52 Stat 1034, c 645). The last extension provided that the "lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trusts and supervision until January 1, 1984, unless otherwise provided by Act of Congress."

Application of the foregoing provisions to the estate in issue produces this picture: Legal title to the mineral in-

terests, the funds and the securities constituting the corpus of the trust estate is in the United States as trustee. The United States received legal title to the mineral interests in 1883, when it took what is now Osage County from the Cherokees in trust for the Osages; and that title has not subsequently been transferred. Legal title to the various funds and securities adhered to the United States as the pertinent trusts were established and developed. Beneficial title to these properties was vested in the decedent and is now held by his sole heir, the appellant. The beneficiary at all times has been entitled to at least a limited amount of interest and royalties arising out of the corpus. And the beneficiary has a reversionary interest in the corpus, an interest that will materialize only when the legal title passes from the United States at the end of the trust period. But until that period ends, the beneficiary has no control over the corpus. See Globe Indem. Co. v. Bruce (CCA10th Okla) 81 F2d 143, 150.

Headnote 2

Since 1819, when M'Culloch v. Maryland, 4 Wheat (US) 316, 4 L ed 579, was decided, it has been established that the property of the United States is immune from any form of state taxation, unless Congress expressly consents to the imposition of such liability. Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 US 151, 29 L ed 845, 6 S Ct 670; United States v. Allegheny County, 322 US 174, 88 L ed 1209, 64 S Ct 908. This tax immunity grows out of the supremacy of the Federal Government and the necessity that it will be able to deal with its own property free from any interference or embarrassment that state taxation might impose. M'Culloch v. Maryland, 4 Wheat (US) 316, 4 L ed 579, supra; Wisconsin C. R. Co. v. Price County, 133 US 496, 33 L ed 687, 10 S Ct 341.

In United States v. Rickert, 188 US 432, 47 L ed 532, 23 S Ct 478, the same rule was held to apply where the United States holds legal title to land in trust for an Indian

or a tribe. The United States there held legal title to certain lands in trust for a band of Sioux Indians which was in actual possession of the lands. This Court held that neither the lands nor the permanent improvements thereon were subject to state or local ad valorem taxes. It was emphasized that the fee title remained in the United States in obvious execution of its protective policy toward its wards, the Sioux Indians. To tax these lands and the improvements thereon, without congressional consent, would be to tax a means employed by the Government to accomplish beneficent objects relative to a dependent class of individuals. Moreover, the United States had agreed to convey the lands to the allottees in fee at the end of the trust period "free of all charge or incumbrances whatsoever." If the tax in question were assessed and unpaid, the lands could be sold by the tax authorities. The United States would thus be so burdened that it could not discharge its obligation to convey unencumbered land without paying the taxes imposed from year to year.

Further application of the tax immunity rule to land held in trust by the United States for the benefit of Indians was made in McCurdy v. United States, 264 US 484, 68 L ed 801, 44 S Ct 345. That case involved surplus lands that had been allotted to members of the Osage Tribe. It will be recalled that the Osage Allotment Act of June 28, 1906, had made these surplus lands expressly taxable after three years or at the death of the allottee. The allottees in the McCurdy Case died within the three-year period but before deeds to their allotted lands had been executed and delivered to them. Oklahoma sought to place a tax on the lands, the taxable date being within the three-year period and before the execution and delivery of the deeds to the heirs of the allottees. This Court held that legal title to the lands in issue was still in the United States as trustee on the taxable date, title not passing until the execution and delivery of the deeds. In reliance on the Rickert Case, the conclusion was reached that the lands were not taxable while held in

trust by the United States. See also United States v. Fremont County (CCA 10th Wyo) 145 F2d 329; United States v. Thurston County (CCA 8th) 143 F 287.

Since the property here involved is all held in trust by the United States for the benefit of the decedent and his heirs, it is thought to be immune from any form of state taxation under the decisions in the Rickert and McCurdy Cases. Reference is made to certain provisions of the Oklahoma Inheritance and Transfer Tax Act which indicate that the inheritance tax in issue might have a very real and direct effect upon the property to which the United States holds title, an effect similar to that which was emphasized in the Rickert Case. The Act applies, of course, to the transfer of estates held in trust. § 989. Specific provision is then made in § 989i that "Taxes levied under this Act shall be and remain a lien upon all the property transferred until paid." Provision is also made for the sale of estate property if necessary to satisfy the tax. §§ 989i and 989l. It is therefore possible that if the tax were unpaid Oklahoma might try to place a lien upon the property which is being transferred, property as to which the United States holds legal title. Complications might arise as to the validity of such a lien. And the United States would be burdened to the extent of opposing the imposition of the lien or seeing that the tax was paid so as to avoid the lien.

Moreover, insofar as the inheritance tax is paid out of the surplus and trust funds held by the United States, there is a depletion of the corpus to which the United States holds legal title. Such depletion makes that much smaller the estate which the Government has seen fit to hold in trust for the decedent's heirs. If the estate is to be tapped repeatedly by Oklahoma until 1984 by the deaths of the various heirs, the result may be a substantial decrease in the amount then available for distribution.

But our decision in Oklahoma Tax Commission v. United States, 319 US 598, 87 L ed 1612, 63 S Ct 1284, has

foreclosed an application of the Rickert and McCurdy Cases to the estate and inheritance tax situation. Among the properties involved in the Oklahoma Tax Commission Case were restricted cash and securities, which could not be freely alienated or used by the Indians without the approval of the Secretary of the Interior. We held that the restriction, without more, was not the equivalent of a congressional grant of estate tax immunity for the transfer of the cash and securities. Moreover, express repudiation was made of the concept that these restricted properties were federal instrumentalities and therefore constitutionally exempt from estate tax consequences. See also Helvering v. Mountain Producers Corp. 303 US 376, 82 L ed 907, 58 S Ct 623. The very foundation upon which the Rickert Case rested was thus held to be inapplicable.

We fail to see any substantial difference for estate tax purposes between restricted property and trust property. The power of Congress over both types of property is the same. Creek County v. Seber, 318 US 705, 717, 87 L ed 1094, 1103, 63 S Ct 920; United States v. Ramsey, 271 US 467, 471, 70 L ed 1039, 1041, 46 S Ct 559. Both devices have the common purpose of protecting those who have been found by Congress to be unable yet to assume a fully independent status relative to property. The effect which an estate or inheritance tax may have is the same in both instances; liens may be placed on both restricted and trust properties and lead to complications; and both types of property may of necessity be depleted to assure payment of the tax. The fact that the United States holds legal title as to trust property but not a to restricted property affords no distinguishing characteristic from the standpoint of an estate tax. In addition, Congress has given no indication whatever that trust properties in general are to be given any greater tax exemption than restricted properties. Hence the Oklahoma Tax Commission Case must control our disposition of this proceeding.

[APPENDIX]

Headnote 3

Implicit in this Court's refusal to apply the Rickert doctrine to an estate or inheritance tax situation is a recognition that such a tax rests upon a basis different from that underlying a property tax. An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. United States Trust Co. v. Helvering, 307 US 57, 60, 83 L ed 1104, 1107, 59 S Ct 692; Whitney v. State Tax Commission, 309 US 530, 538, 84 L ed 909, 913, 60 S Ct 635. In this case, for example, the decedent had a vested interest in his Osage headright; and he had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. It is the tranfer of these incidents, rather than the trust properties themselves, that is the subject of the inheritance tax in question. In this setting, refinements of title are immaterial. Whether legal title to the properties is in the United States or in the decedent and his heir is of no consequence to the taxability of the transfer.

The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the Oklahoma Tax Commission Case permits that liability to be imposed. But that case also makes clear that should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however.

We have considered the other points raised by the appellant but deem them to be without merit. The judgment below is therefore affirmed.

The Chief Justice, Mr. Justice Frankfurter and Mr. Justice Douglas dissent.

# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ——

UNITED STATES OF AMERICA, PETITIONER

*v.*

ARCHIE L. MASON, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS**

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

**OPINION BELOW**

The opinion of the Court of Claims is reported at 461 F. 2d 1364. It is reproduced as Appendix A to the petition for a writ of certiorari filed by the State of Oklahoma in this case (No. 72–606, Pet. App. A–1 to A–29).

**JURISDICTION**

The judgment of the Court of Claims was entered on June 16, 1972 (No. 72–606, Pet. App. A–1). On September 13, 1972, Chief Justice Burger extended



479-992—72

the time for the United States to file a petition for a writ of certiorari to and including October 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

## QUESTIONS PRESENTED

1. Whether the United States is liable to the estate of a restricted Osage Indian for inheritance taxes it paid to the State of Oklahoma in reliance on this Court's decision in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717, on the ground that it violated its duty as a fiduciary in not seeking the overruling of the *West* decision.

2. Whether *West* v. *Oklahoma Tax Commission,* 334 U.S. 717, should be overruled.

## STATEMENT

In 1948, this Court held, in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717, that the State of Oklahoma may levy its inheritance tax on the estates of restricted Osage Indians, including the portions of such estates held in trust by the United States. The trust properties in *West,* as in the present case, consisted of mineral headrights in Osage lands in Oklahoma, a proportionate share of the sum realized from selling previous tribal lands in Kansas, and additional items representing accumulated income; indeed, the cases both involved shares of the same fund.[1]

In 1967 and 1968, the Osage Agency of the Bureau of Indian Affairs, Department of the Interior, paid to the Oklahoma Tax Commission the total sum of

[1] Compare Pet. App. A–4 in No. 72–606 with 334 U.S. at 719.

$8,087.10 in inheritance taxes on the estate of Rose Mason, an incompetent or restricted Osage Indian. Her administrators then brought the present suit against the United States in the Court of Claims, alleging that this Court's decision in *West* had been so weakened by subsequent cases that the United States as fiduciary was obliged to challenge the tax, and not to pay it.

The Court of Claims held that because of this Court's decision in *Squire* v. *Capoeman,* 351 U.S. 1, and subsequent developments "the *West* result is no longer controlling * * *" (No. 72–606, Pet. App. A–24), that the United States' payment of the tax was therefore a breach of its fiduciary duty to the Mason estate, that the measure of damages is the amount of tax paid, that the United States is liable in that amount to the estate, and that the United States is entitled to be indemnified by the State of Oklahoma in the same amount.

The State of Oklahoma, which bears the ultimate burden of the decision below, has filed a petition for certiorari (*State of Oklahoma* v. *Mason and the United States,* No. 72–606) to review the holding below that Oklahoma is bound to repay the tax. Though the question in that case is not identical with the issue raised here, it is obvious that the two cases are closely related.

## REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims creates serious doubt, which only this Court can settle, con-

cerning the duty of the government with respect to the payment of state inheritance taxes on the restricted estates of Indians. This Court in *West, supra,* recognized that the Osage property in question in that case (and here) which the United States held in trust was not itself taxable (334 U.S. at 725) but distinguished between a tax on the property and a tax on the transfer of the property to another (*id.* at 727). The Court was aware that the economic effect of either tax could be the depletion of the trust corpus (*id.* at 725). The decision was consistent with then permitted federal income taxation of the revenues produced by such property and the imposition of federal estate taxes on the transfer of such property.

Several years later in *Squire* v. *Capoeman,* 351 U.S. 1, this Court held that the government's statutory duty to return lands to Indian allottees free of any lien or encumbrance prohibited the United States from assessing a capital gain tax on the profit resulting from a sale of timber produced on the allotted trust land. The Court stated that "to protect the Indians' interest * * * it is necessary to preserve the trust and income derived directly therefrom, but it is not necessary to exempt reinvestment income from tax burdens." 351 U.S. at 9.

As a consequence of *Squire* v. *Capoeman,* the federal government no longer attempts to tax income derived by Indians directly from the use of Indian land which is itself tax exempt unless Congress has specifically authorized such taxation. See our *amicus* brief in

*Mescalero Apache Tribe* v. *Jones,* No. 71–738, certiorari granted, April 24, 1972 (406 U.S. 905).

The Internal Revenue Service has also ruled that property such as that in question here is immune from the federal estate tax. See Rev. Rul. 69–164, 1969–1 Cum. Bull. 220. The Court of Claims has now in effect ruled that *West* is no longer good law as applied to a state inheritance tax. Although a determination of the continuing validity of *West* may not be essential for a determination of this case (including the State's petition in No. 72–606), the question is properly before the Court, the issues have been fully developed in the proceedings below, and, in our view, it would be appropriate for the Court to settle the matter now.

2. Whether *West* is reaffirmed or overruled, the decision of the Court of Claims holding the government liable for breach of fiduciary duty should be reversed. We agree that the government has a fiduciary duty to preserve the estate of Rose Mason and not to pay a tax that is not owed. But the government as trustee also has the duty to pay taxes that are due. *West* v. *Oklahoma Tax Commission* is not an authority only obliquely in point; it is a decision of this Court squarely ruling on the same tax as applied to the same fund in question here. No subsequent opinion of this Court has questioned the continuing validity of *West*. Though the Court may now overrule *West* and though a trustee might have been justified in refusing to pay the tax in order to test the continuing

vitality of *West*, we know of no precedent (prior to the decision below) for imposing so strict a standard on a trustee, governmental or private, as to hold him liable in damages if he fails in such circumstances to contest a direct holding of the highest court of the relevant jurisdiction. The decision of the Court of Claims not only imposes that standard but assumes a 100 percent probability that this Court would overrule *West* to justify a measure of damages at the full amount of tax paid. This unprecedented imposition of liability on a trustee for complying with one of this Court's previous decisions should not be permitted to stand.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-[illegible]

STATE OF OKLAHOMA,

*Petitioner,*

v.

ARCHIE L. MASON, ET AL.,

*Respondents.*

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No. 72-454

UNITED STATES OF AMERICA,

*Petitioner,*

v.

ARCHIE L. MASON, ET AL.,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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*Respondents.*

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No. 72-654

UNITED STATES OF AMERICA,
*Petitioner,*

v.

ARCHIE L. MASON, ET AL.,
*Respondents.*

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## BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Respondents Archie L. Mason and Margaret R. Mason, administrators of the estate of Rose Mason, herewith file their opposition to the petitions for writ of certiorari filed by the State of Oklahoma and the United States to review the judgment of the United States Court of Claims in this case.

### STATEMENT

This litigation concerns the applicability of the Oklahoma estate tax to properties held in trust by the United States under the Osage Allotment Act of 1906, as amend-

ed. Under the terms of that Act, the United States serves as trustee over certain properties of Osage Indians who have not received a certificate of competency. Respondents' ancestor, Rose Mason, was a restricted, noncompetent Osage Indian for whom the United States served as trustee pursuant to the Act.

On the death of Rose Mason, the United States filed an Oklahoma estate tax return on behalf of her estate and included therein, as part of the taxable corpus of that estate, property held in trust by the United States pursuant to the Osage Allotment Act. In accordance with the return, the United States made payments of Oklahoma estate taxes in September, 1967 and December, 1968. The United States never challenged or contested the assessment of Oklahoma estate taxes on these trust properties but simply paid these taxes out of trust monies without hesitation; nor did the United States ever seek a refund of the taxes paid. In November, 1970, respondents, as administrators of the estate of Rose Mason, filed suit against the United States, charging a breach of fiduciary duty, and challenging the legality of the payment of Oklahoma estate taxes assessed against properties held in trust by the United States. The State of Oklahoma was thereupon impleaded by the United States as a third-party defendant.

The United States and Oklahoma defended on the principal ground that payment of Oklahoma estate taxes was an appropriate expenditure under the authority of *West* v. *Oklahoma Tax Comm'n*, 334 U.S. 717 (1948).

Subsequent to briefing and argument, the Court of Claims held (a) that *West* v. *Oklahoma Tax Comm'n* had, by implication, been severely modified, if not overruled, by *Squire* v. *Capoeman*, 351 U.S. 1 (1956), and that the *West* case had not been followed by the lower federal courts since the *Capoeman* case, and that there-

fore the payment of state death taxes was unlawful; (b) that the United States had breached its fiduciary obligation by not contesting the imposition of Oklahoma estate taxes on the trust properties of respondents' ancestor or seeking a refund thereof despite clear notice that the law had changed; and (c) that the United States was therefore liable for the amount of estate taxes wrongfully paid over, and that, in turn, the State of Oklahoma was liable to the United States for the amount of estate taxes unlawfully collected.

The Court of Claims noted that the United States itself had conceded that Osage trust property was exempt from federal death taxes, which are not distinguishable in principle from state death taxes.[1] Even after this concession was made, the United States continued to pay Oklahoma death taxes with respect to Osage trust properties. The court concluded that the failure of the United States to challenge payment of the state taxes assessed against the Mason estate or to seek a refund required a conclusion that the United States had breached its fiduciary obligation.

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[1] In *Beartrack* v. *United States*, Ct.Cl. Dkt. No. 281-67, the representative of a deceased restricted Osage sued for a refund of federal estate taxes which the United States had imposed on the estate. The suit was based on the contention that the *Capoeman* rationale applied to Osage trust properties. Before the case was decided, the United States in effect confessed error, and voluntarily refunded the entire amount of federal estate taxes. Subsequently, the Internal Revenue Service issued a ruling that the *Capoeman* rationale immunized Indian trust properties from federal estate taxation (Rev.Rul. 69-164, 1969-1 I.R.B. 220) and, in another ruling, specifically held that Osage trust properties were immune from such taxation. These events all occurred before, or shortly after, the payment of Oklahoma estate taxes in the instant case.

## ARGUMENT

Respondents submit that review is not required because the *West* case was effectively overruled by *Squire* v. *Capoeman*. However, if certiorari is granted it should be limited to whether *West* v. *Oklahoma Tax Comm'n* any longer represents good law. The other questions presented by the petitioners are either premature, and should not be considered by the Court at this time, or they do not warrant review.

### I

### Certiorari Should Be Limited to Whether *West* v. *Oklahoma Tax Comm'n* Should Be Overruled.

There is no question that the decision of the Court of Claims in this case is contrary, at least on its face, to the result reached in *West* v. *Oklahoma Tax Comm'n*.[2] As the opinion of the Court of Claims makes clear, however, the *West* case was not this Court's last pronouncement on the issue of Indian taxation. In 1956, this Court issued the landmark decision of *Squire* v. *Capoeman*, *supra*, which, while not explicitly overruling *West*, clearly and necessarily modified the decisional rationale of that earlier case. *Squire* v. *Capoeman* modified the *West* decision in these major respects:

(1) *Capoeman* revitalized the traditional liberal policy of statutory interpretation governing the taxability of Indians and Indian properties, a policy not found in *West;* (2) *Capoeman* laid down the principle that while Indian tax immunity had to be found in treaties or

[2] The Court of Claims recognized that it is possible to read *West* as exempting these trust properties from state death taxation on the basis of another point decided in *West*, namely, that properties exempt from "direct" taxation are also exempt from death taxation, since it is now recognized that income from Osage trust property is exempt from federal income taxation, a form of direct taxation. 461 F.2d at 1378.

statutes, as *West* and other cases had held, the immunity need not be express, and can be based on clear implication; (3) *Capoeman* emphasized the statutory undertaking of the United States to preserve and protect Indian trust properties during the period of the trust, thus effectuating the policy and purpose of Indian allotment statutes, and concluded that this undertaking clearly implied tax immunity. Since *West* had found (but without the kind of analysis made in *Capoeman*) that the Osage Allotment Act did not confer immunity, and yet *Capoeman* had found immunity in an indistinguishable allotment act, it was obvious that the later case was inconsistent with the earlier one, and represented a change in the law.

Since the *Capoeman* decision, no less than four lower federal courts, in six separate decisions, have considered the impact of *Capoeman* on the issue of federal and state death taxation of Indian trust properties and each of these courts has consistently construed *Capoeman* as requiring a finding of the tax immunity for such properties.[3] Additionally, the United States has determined that *Capoeman* prohibits federal income taxation of income derived from Indian (including the Osages) trust properties and the imposition of federal estate taxes thereon. See Petition of the United States, pp. 4-5.

*West* v. *Oklahoma Tax Comm'n* has never been directly and expressly overruled. The time may be appropriate for a reexamination of the tax immunity of properties held in trust by the United States pursuant to the Osage Allotment Act and, more particularly, to consider whether the *West* decision, *if* truly contrary to the result reached in the instant case, still has vitality. The question of that case's continuing validity is properly before the Court and was directly and essentially litigated below.

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[3] These cases were all considered by the Court of Claims. See 461 F.2d at 1370-71.

## II

**The Other Questions Presented by the Petitioners Are Not Appropriate for Review.**

The several other questions presented by the petitioners for this Court's consideration on certiorari do not merit review. These questions are either not raised by the facts in the instant case or they involve questions of law which are neither novel nor significant. The reasons for denying certiorari of these questions are dealt with below.

### A. *Adherence to Earlier Supreme Court Precedent.*

No appropriate ground for certiorari review is presented by the State of Oklahoma's argument concerning the Court of Claims' holding that *West* v. *Oklahoma Tax Comm'n* no longer represented good law. The only legitimate issue arising from the Court of Claims' decision not to follow *West* is whether its perception that *Squire* v. *Capoeman*, *supra* and its progeny constituted a new decisional trend was a correct one. This question goes, of course, to the matter of the continuing validity of *West*, a matter which respondents concur may merit the consideration of this Court.

There is no substance to the argument that the Court of Claims lacked power to deviate from *West*. The opinion of the Court of Claims demonstrates that that court was fully cognizant of the limitations on its power, and the care and sensitivity with which a lower court must approach the question of not following a Supreme Court case in point. The considered analysis made by the Court of Claims of the *West* and *Capoeman* decisions and the interpretation and application of the *Capoeman* rationale by the lower federal courts and the Internal Revenue Service show definitively that the Court of Claims approached this sensitive area with the degree of care and deference required of an inferior court.

If it is the position of the State of Oklahoma that a lower federal court must *always* follow an earlier Supreme Court precedent, regardless of changed circumstances or intervening events, it is clearly wrong. The relevant authorities demonstrate that in infrequent, well-defined circumstances, it is both appropriate and requisite for a lower federal court to conclude that an earlier Supreme Court case no longer represents good law. See, *e.g.*, *Rowe* v. *Peyton*, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968); *Andrews* v. *Louisville & N.R.R.*, 441 F.2d 1222 (5th Cir. 1971), *aff'd*, 406 U.S. 320 (1972); *Browder* v. *Gail*, 142 F.Supp. 707 (M.D.Ala. 1956), *aff'd*, 352 U.S. 903 (1956); *Barnette* v. *West Virginia State Board of Education*, 47 F.Supp. 251, 252-53 (S.D.W.Va. 1942), 319 U.S. 624 (1943); *Perkins* v. *Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2d Cir. 1942), *aff'd*, 317 U.S. 501 (1943).

### B. *Liability of State of Oklahoma.*

The State of Oklahoma raises no meritorious question in arguing that it should not be held liable for a breach of fiduciary relationship by the United States. This argument exhibits a basic misconception of the decision below and of the nature and purpose of third-party practice and procedure. The basic object of third-party procedure is to avoid circuity of action and to insure consistency of result where the respective liabilities of several parties arise from the same set of operative facts. In third-party practice, it is not necessary that there be an identity between the legal theory or basis of the claim asserted against the defendant and the claim asserted against the third-party defendant. It is only required that their respective alleged liabilities arise from the same set of operative facts.

In the instant case, the State of Oklahoma was not held liable for breach of fiduciary duty. Instead, it was held liable over to the United States on the ground that

the estate taxes collected by it against the estate of Rose Mason were wrongfully exacted and were not in fact due. There is ample authority for the proposition that the United States, as trustee, can sue for return of money improperly paid over. See *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369-70 (1968). The theory of liability in such an instance is not for breach of a fiduciary obligation but for return of money improperly paid and received. There is thus clearly no point in requiring the parties to brief and argue, and the Court to consider, such a question. The only real question is whether *West* is still good law. If not, Oklahoma must disgorge what it wrongfully collected.

### C. *Retroactive Operation of Decision.*

The last question presented by the State of Oklahoma is whether it may be held liable retroactively should the *Mason* decision be upheld. Consideration of the retroactivity issue would be premature at this point. This issue was not considered in the proceedings below and was not raised by the facts in the instant case. This suit involved only a challenge of the legality of the payment of Oklahoma estate taxes with respect to the estate of Rose Mason and no other payments. In view of this limited claim, there was no development of the considerations and circumstances relating to the issue of retroactivity.[4]

This Court has observed that a determination on the issue of retroactivity must be premised on a full consideration of the facts and circumstances relating to the individual case. See *Linkletter* v. *Walker*, 381 U.S. 618, 627-29 (1965); *cf.*, *Simpson* v. *Union Oil Co.*, 377 U.S.

[4] The question of retroactivity may well be in issue in two related suits which are presently pending in the lower federal courts, one in the United States District Court for the Western District of Oklahoma and the other in the Court of Claims. See Petition of State of Oklahoma, pp. 6-7.

13, 24-25 (1964). Respondents respectfully submit that there was no ventilation or exploration below of the factors relevant to a determination of retroactivity, so that this Court's consideration of that issue at this time is not warranted. Respondents would note, at this point, however, that the policy and purpose of the Osage Allotment Act—preservation and protection of the trust properties of Osage Indians until termination of the trust—commend application of the general rule of retroactivity to the decision below.

### D. *Fiduciary Duty of the United States.*

The United States argues that the decision of the Court of Claims imposed an unwarranted fiduciary duty on it. In fact, the decision of the Court of Claims represents nothing more than the application of well-established trust principles. The decision did not announce any novel concept of trust law nor did it impose any unreasonable responsibility on the United States.

The Court of Claims decided that the United States had violated its duty to its Indian ward by neither contesting the applicability of Oklahoma estate taxes to the trust properties in question, nor seeking a refund of those taxes after they had been paid. The Court of Claims concluded, *on the basis of the facts of this case*, that this Court's decision in *Squire* v. *Capoeman*, the application of the *Capoeman* rationale to similar classes of Indian trust properties by lower federal courts and certain administrative action of the United States itself, raised such a serious question as to the validity of *West* as a precedent as to require affirmative action on the part of the United States to get it resolved one way or the other.[5]

[5] The Court of Claims did not decide the issue of whether the United States would be required to reimburse the estate of Rose Mason for unlawfully collected taxes regardless of considerations of notice of the "possible fallibility of *West*." 461 F.2d at 1372.

The opinion of the Court of Claims ably sets forth the intervening judicial decisions since *West* and no purpose would be served by repeating this history here. See 461 F.2d at 1370-71, 1376-77. The Court of Claims also considered the fact that, no later than a few months after its final payment of taxes with respect to the *Mason* estate, the United States had completely adopted the *Capoeman* rationale with respect to federal estate taxation of Osage estates. The inherent contradiction between this action and the failure of the United States to even seek a refund of the taxes paid on behalf of the Mason estate is inescapable.[6]

As far as the *factual* part of the lower court's holding is concerned, there was ample support in this record for the conclusion that the failure of the United States to take *any* action with respect to the Oklahoma estate taxes assessed against the estate of Rose Mason was unreasonable under the circumstances and a breach of its fiduciary duty. That being the case, no ground for review by this Court is raised with respect to the Court of Claims' decision concerning the "unreasonableness" of the actions of the United States.

So far as the *law* is concerned, the Court of Claims only followed established principles governing the fiduciary duty of the United States to its Indian wards, and nothing worthy of review is presented. There can be no doubt that the United States owes its Indian wards a fiduciary obligation of the highest order. See, *e.g.*, *Seminole Nation* v. *United States*, 316 U.S. 286, 297-98 (1942). It is also clear that the United States has the obligation and the power to protect its Indian wards and to preserve their rights and immunities. See, *e.g.*, *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715-17

[6] In fact, the United States continued to pay Oklahoma estate taxes assessed with respect to trust properties of restricted Osage Indians until after the decision of the Court of Claims in this case.

(1943); *Mott* v. *United States*, 283 U.S. 747, 750 (1931). This obligation has been specifically recognized with respect to the Osages and to suits by the United States to recover state taxes unlawfully imposed on Osage property. See *United States* v. *Board of County Comm'rs of Osage County*, 251 U.S. 128 (1913), *cf.*, *Mashunkashey* v. *United States*, 131 F.2d 288, 291 (10th Cir. 1942), *cert. denied*, 318 U.S. 764 (1943).

A necessary concomitant to this duty of protection is the responsibility and requirement to act when the relevant circumstances require it. This requirement or responsibility is no more extensive than the established equitable principle that a trustee has the affirmative duty "to do what is reasonable under the circumstances" to resist and defend against claims of third persons against the trust. See II Scott, *Trusts* § 178 (3d ed. 1967); see *id.* at § 177.[7] The decision of the Court of Claims rests firmly on established equitable principles governing the duties and obligations of a trustee and no new or signal point of law is raised with respect to this question by that decision. Accordingly, the petition of the United States requesting review of this particular question should be denied.

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[7] The affirmative duty of the United States to seek recovery of taxes on behalf of its Indian wards was recognized in *United States* v. *Dewey County*, 14 F.2d 784 (D.S.D. 1926), *aff'd*, 26 F.2d 434 (8th Cir.), *cert. denied*, 278 U.S. 649 (1928); *United States* v. *Nez Perce County*, 16 F. Supp. 267, 268 (D.Idaho 1936), *aff'd*, 95 F.2d 232 (9th Cir. 1938); *cf.*, *Town of Okemah* v. *United States*, 140 F.2d 963, 974 (10th Cir. 1944); *United States* v. *Charles*, 23 F.Supp. 346, 348 (W.D.N.Y. 1936).

## CONCLUSION

For the foregoing reasons, respondents suggest that if certiorari should be granted, it be limited to the sole issue of whether *West* v. *Oklahoma Tax Comm'n* is still good law.

Respectfully submitted,

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NOVEMBER 15, 1972

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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-606

THE STATE OF OKLAHOMA,
*Petitioner,*

VERSUS

ARCHIE L. MASON, ET AL.,
*Respondents.*

No. 72-654

UNITED STATES OF AMERICA,
*Petitioner,*

VERSUS

ARCHIE L. MASON, ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

# BRIEF OF PETITIONER, STATE OF OKLAHOMA

## OPINION BELOW

The opinion of the United States Court of Claims is reported at 461 F.2d 1364. It is reproduced as Appendix A to the Petition for a Writ of Certiorari filed by the State of Oklahoma in this case (No. 72-606, Pet. App. A-1 to A-29).

## JURISDICTION

The judgment of the United States Court of Claims was entered on June 16, 1972. On September 12, 1972, Mr. Justice White granted petitioner's (State of Oklahoma) application for additional time in which to file its Petition for Writ of Certiorari to October 16, 1972. The Petition was filed October 16, 1972, and was granted on January 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1225.

## QUESTIONS PRESENTED

1. Did the United States Court of Claims err in attempting to overrule a decision of the United States Supreme Court directly on point?

2. Did the United States Supreme Court decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), effectively overrule that Court's decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948)?

3. Did the United States breach its fiduciary duty to the Osage Indians, and if so, when did such breach occur?

## STATEMENT OF THE CASE

On November 20, 1970, an original action against the United States was brought in the United States Court of Claims by Archie L. Mason and Margaret R. Mason, Administrators of the Estate of Rose Mason, Osage Allottee No. 327, a deceased restricted Osage Indian. The action against the United States was maintained on an alleged breach of fiduciary relationship created by the Osage Allotment Act of 1906, 34 Stat. 539 (often amended).

The Osage Allotment Act, *supra*, divided tribal lands and funds equally among 2,229 tribal members thereby creating "headrights," a term used to describe each of the fractional shares of the distributable income from mineral production together with a reversionary title to a like share of minerals whenever the trust terminates. Under this Act, royalties resulting from the mineral production are placed in the United States Treasury and credited to the individual members of the tribe. Although this trust was initially created for a period of 25 years, the trust period has been extended by statutory amendment to 1983 (52 Stat. 1034, §3). During the period of the trust, legal title to the minerals is in the United States as trustee, but thereafter will vest absolutely in the allottees or their heirs (Section 2(7) and Section 5 of the Osage Allotment Act, *supra*).

The Osage Allotment Act, *supra*, further provides for the issuance by the Secretary of Interior of certificates of competency to adult Osages who were "fully competent and capable of transacting his or her own business and caring for his or her own individual affairs."

Rose Mason was an Osage Indian living in Oklahoma who never received a certificate of competency and the United States held in trust certain of her property. On the death of Rose Mason, the United States through the Osage Agency prepared, signed and filed an Oklahoma estate tax return, including therein as part of the corpus of the estate, property held in trust by the United States. In accordance with the estate tax return, payment of the tax was made in September of 1967 and December of 1968 to the Oklahoma Tax Commission, from the trust fund of Rose Mason held by the United States. The levy of estate tax by the State of Oklahoma and payment thereunder by the United States was based on the United States Supreme Court decision in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948) (Appendix of Oklahoma's Petition for Certiorari, No. 72-606, Pet. App. B-1 to B-15),[1] which until the present case has been the only expression by this Court of the propriety in levying and collecting such a tax from the Osage.

Archie L. Mason and Margaret R. Mason were appointed co-administrators of the estate of Rose Mason by the County Court of Osage County, Oklahoma, and were subsequently discharged as co-administrators in May of 1968. It is admitted that as administrators, Archie L. Mason and Margaret R. Mason did not participate in the filing of

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[1] The appendix to Oklahoma's Petition for Certiorari contains the United States Court of Claims' decision of *Mason* v. *U. S.,* 461 F.2d 1364 (1972) in Appendix A and the United States Supreme Court decision of *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948), in Appendix B. The Petition for Writ of Certiorari of the United States did not contain an appendix. It was stipulated by counsel for all parties that these decisions would not be reprinted in the single appendix filed with the briefs. Hereafter, reference to either decision will be Pet. App. A or Pet. App. B.

the estate tax return, or the payment of the estate taxes. In November of 1970, the District Court of Osage County allowed the estate of Rose Mason to be reopened, and thereafter reappointed Archie L. Mason and Margaret R. Mason as co-administrators for the specific purpose of instituting a lawsuit to determine if the estate taxes had been erroneously collected and paid by the United States to the State of Oklahoma.

Thereafter this action was maintained in the United States Court of Claims against the United States for a breach of fiduciary relationship in the payment of the Oklahoma estate tax. The State of Oklahoma was impleaded as a third party defendant by the United States, and the United States sought a judgment against the State of Oklahoma in an amount equal to the judgment, if any, which might be obtained against the United States by the administrator.

The case was argued in the United States Court of Claims, and was decided by that Court on June 16, 1972 (Pet. App. A-1 to A-29). In its decision, the United States Court of Claims ruled that *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948) (Pet. App. B-1 to B-15), does not represent the current state of the law, and that the United States breached its fiduciary relationship to the Osage by paying the estate tax levied by the State of Oklahoma and was liable to the Osage for such payment. In turn, the State of Oklahoma was found to be liable to the United States for the full amount of the judgment against the United States. *Mason* v. *U. S.,* 461 F.2d 1364, 1379 (1972) (Pet. App. A-25).

## SUMMARY OF ARGUMENT

1. The United States Court of Claims' ruling in *Mason* v. *U. S.*, 461 F.2d 1364 (1972), is directly contra to the United States Supreme Court ruling in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948). Whether the legal concepts on which *West* was based are still proper is something that only the Supreme Court may decide in light of the *West* decision directly on point. The United States Court of Claims' expression that the United States Supreme Court decision in *Squire* v. *Capoeman,* 351 U.S. 1 (1956), made inroads on the reasoning underlying *West, supra,* is not, even if correct, a sufficient expression by the Supreme Court to warrant overruling the *West* decision or determining that the United States government breached its fiduciary relationship with the Osage Indian. The Court of Claims' reliance upon the subsequent lower court decisions and administrative practices applied to the *Squire* decision as having further eroded the principles of law upon which *West* was based is improper. Lower court decisions and administrative practices may not erode a decision of the United States Supreme Court.

2. *Squire* v. *Capoeman, supra,* is sufficiently distinguishable upon its facts from *West* v. *Oklahoma Tax Commission, supra,* that it cannot be said to have overruled the *West* decision. *Squire* apparently repudiated the doctrine of the ward being taxed for the benefit of the guardian, particularly when the guardian had the direct ability to determine the advent of the tax consequence. Neither of these elements arise from the State levying the estate tax in question. While under a capital gains tax such as that in

*Squire, supra,* it can always be shown that the restricted Indian may have his property diminshed in value so that "he cannot go forward when declared competent with the necessary chance of economic survival in competition with others" (351 U.S. at 10), this cannot be said of the *Mason* tax. In *Mason, supra,* the tax is levied upon the estate of the deceased restricted Osage Indian, and the monetary benefit therefrom may in actuality pass to a person not sought to be protected by the Allotment Acts or the precepts of *Squire.*

3. The central issue in allowing an Osage recovery is the determination of whether the United States violated its duty as a fiduciary in not attempting to overturn the Supreme Court decision relied upon for the payment of the estate tax to the State of Oklahoma. There is no precedent for imposing the severe standard on a trustee which the Court of Claims suggests in *Mason.* The United States, as fiduciary, was entitled to rely upon the Supreme Court decision in *West, supra.* Even if the subsequent decision by this Court in *Squire, supra,* made inroads on the *West* decision, these inroads were not sufficient to place the burden upon the United States which the Court of Claims has done in *Mason.*

I

With the advent of the *Mason* v. *U. S.,* 461 F.2d 1364 (1972) (Pet. App. A-1 to A-25), decision by the United States Court of Claims, there exists an irreconcilable conflict upon an identical fact situation between that Court in *Mason* and the United States Supreme Court decision in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948)

(Pet. App. B-1 to B-15). It appears inevitable that this Court should and perhaps must re-evaluate its ruling with respect to the propriety of the State of Oklahoma's levying estate tax on the estates of deceased restricted Osage Indians. However, a ruling by this Court solely on the question of the present validity of *West, supra,* will not resolve all of the questions raised by *Mason, supra,* or those which arise as the result of the class action suit instituted by the Osage on behalf of all "heirs, beneficiaries, and personal representatives of deceased restricted Osage Indians whose estates were reduced by the wrongful payment by the defendant of Oklahoma estate taxes."[2] It would seem proper therefore for this Court to decide all relevant questions raised by the *Mason* decision so as to establish legal guidelines for both this and identical pending litigation.

The Osage contend that this Court should consider only the question of whether *West* v. *Oklahoma Tax Commission, supra, should be* overruled (Brief in Opposition to Petition for Writ of Certiorari, p. 4). It is important to note that the basis for the Osage claim in the original action filed in the United States Court of Claims was based upon a breach of the fiduciary duty by the United States. Paragraphs 7, 8 and 9 of the Osage Petition filed with the United States Court of Claims set forth this alleged breach

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[2] Following the *Mason* decision, a class action was instituted on July 11, 1972, in the United States Court of Claims, styled *Wilson, et al.* v. *U. S.,* Court of Claims No. 285-72. It is estimated that there are over 300 members of that class and the action if successful will make the State of Oklahoma ultimately liable under the Court of Claims' ruling in *Mason, supra,* for all monies collected from whenever that Court determines the United States breached its fiduciary duty.

of duty (App. 6).[3] Oklahoma, as stated previously, agrees that this Court should decide the current acceptability of *West*. This however will not, standing alone, answer fully the contention of the Osage which is the basis of the original lawsuit. There exists a fine difference between "should be overruled" and "has been overruled" which is in fact the difference in the lawsuit. It is Oklahoma's position that this Court could presently find that the *West* decision should be overruled and still find that the United States has not breached its fiduciary duty to the Osage in following *West* to this time. Further, if this Court finds that *West* should indeed be overruled and that the United States did breach its fiduciary relationship to the Osage, the determination when such breach took place does not appear to be answered by *Mason*. Certainly the Court of Claims has ruled in *Mason* that the United States breached its fiduciary relationship in September of 1967. However, a careful examination of the Court's ruling leaves open to speculation precisely when such breach occurred.

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[3] Paragraph 7—Defendant's payment of the Oklahoma estate tax on the trust properties described in paragraph 5 hereof was erroneous and wrongful in its breach of its statutory obligation to turn over the trust properties free from any lien or encumbrance.

Paragraph 8—Defendant's erroneous and wrongful payment of the Oklahoma estate tax, as set forth above, depleted and reduced the value of the trust properties held, managed and controlled by the defendant, in violation of the Osage Allotment Act. Such erroneous and wrongful conduct has damaged plaintiffs in that the estate of the decedent has been depleted or reduced by such wrongful payment and has damaged the beneficiaries of the estate of the decedent in that their respective distributive shares of the decedent's estate have been depleted or reduced by such wrongful payment.

Paragraph 9—Defendant, as trustee and custodian of the funds of the decedent, and funds of the decedent's restricted Osage beneficiaries, owe a duty to pay interest at the prevailing rate on said funds, under

At the present time Oklahoma's assessment of estate tax from the estates of deceased restricted Osage Indians is clearly found to be authorized under *West* v. *Oklahoma Tax Commission, supra.* There is no disagreement by the parties that the factual situation existing in *Mason* v. *U. S., supra,* is identical with that found in *West.* Literally, only the names of the parties have been changed. The Court of Claims recognized the identity of the factual situation and stated:

> "Five years later, this holding was applied to the *very type of trust property now before us*—Osage headrights (and funds derived therefrom) and shares of Osage trust fund (derived from the Kansas lands) held in trust by the United States for the Indians. *West* v. *Oklahoma Tax Commission,* supra, 334 U.S. 717 (1948). . . ." *Mason* v. *U. S.,* 461 F.2d 1364, 1370 (1972). (Pet. App. A-8-9). (Emphasis added.)

That Court recognized not only the identity of the factual situation between *Mason* and *West* but also that the last word from the Supreme Court directly interpreting the question involved in *Mason* is contained in *West* v. *Oklahoma Tax Commission, supra.* The Court of Claims stated in *Mason:*

> "The *West* opinion is the last word from the Supreme Court *directly on point,* but is not the last word on Indian tax immunity." *Mason* v. *U. S.,* 461 F.2d 1364, 1370 (1972). (Pet. App. A-9). (Emphasis added.)

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[3] (Continued)
general fiduciary law, the Osage Statutes, and 25 U.S.C. §162A; and as a result, defendant owes interest on the amount wrongfully removed from the said funds, until restored.

After recognizing the import of the *West* decision to the identical fact situation, the only way in which the Court of Claims could arrive at its decision in *Mason* was to deny the integrity of *West* since it was impossible to distinguish it on the basis of the facts in *Mason*. The Court indicated an understanding of the problems in an inferior court overruling a United States Supreme Court decision, but once recognizing the problem, the Court proceeded to do just that.

> "Appraisal of the applicability of the tax necessarily thrusts us into an inquiry of the current status of *West* v. *Oklahoma,* supra, 334 U.S. 717 (1948). For an inferior tribunal this is a most delicate undertaking. *It goes without saying that we cannot refuse or fail to follow a Supreme Court decision, directly in point, because we disagree with its reasoning or think it erroneous.* But our responsibility differs where there have been significant developments— in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court decision have been seriously weakened or eroded." *Mason* v. *U. S.*, 461 F.2d 1364, 1374 (1972). (Pet. App. A-17-18). (Emphasis added.)

In its decision of *McCorkle* v. *First Pennsylvania Banking & Trust Company,* 459 F.2d 243 (1972), the Fourth Circuit Court of Appeals addressed itself to a similar problem as indicated by the Court of Claims in *Mason*. In *McCorkle* the Court stated:

> "It would be sheer presumption for an inferior tribunal to undertake to overrule an explicit decision in the Supreme Court from which the court has given no hint of departing, no matter what may be thought of

the wisdom of that decision. It is a function of the Supreme Court to correct our errors; it is not our function to rectify what we may consider mistakes of the Supreme Court." *McCorkle* v. *First Pennsylvania Banking & Trust Company*, 459 F.2d 243, 249 (1972).

In writing the dissenting opinion in *Mason*, Judge Skelton succinctly stated the problem in the majority's reasoning:

> "I think the majority has fallen into error in refusing to follow the decision of the Supreme Court in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717, 68 S.Ct. 1223, 92 L.Ed. 1676 (1948), which it admits involves the identical problem we have in the instant case and is the only decision of that court that has ever decided the exact question we have before us. That case has never been overruled and the law under which it was decided has not been changed. Consequently, we are required to follow it." *Mason* v. *U. S.*, 461 F.2d 1364, 1379 (1972). (Pet. App. A-26).

The Court of Claims in overruling the *West* decision not only relied upon the Supreme Court decision of *Squire* v. *Capoeman*, 351 U.S. 1 (1956), but also upon decisions of the lower courts and relevant administrative practices.

> "But our responsibility differs where there have been significant developments—in the Supreme Court itself, in the lower courts, and in relevant administrative practice—showing that the underpinnings of the highest court's decision have been seriously weakened or eroded." *Mason* v. *U. S.*, 461 F.2d 1364, 1375 (1972). (Pet. App. A-18).

In support of this reasoning the Court cites three decisions[4] which were embraced and expanded by the Osage brief in opposition to certiorari.[5] It appears however that these cases have uniformly resulted from the United States Supreme Court, by its own decisions, changing the concept on which the prior decision was based.

The great weight of authority supports the reasoning of the Court in *McCorkle* v. *First Pennsylvania Banking & Trust Company, supra.* Certainly, under the decisions cited by the United States Court of Claims or the Osage in their brief in opposition to petition for certiorari, relying on decisions of the lower courts and on administrative practices to alter the Supreme Court's decision appears to be a marked departure from the rules of precedent and *stare decisis* which are obviously important to a smooth administration of the law. In that regard, a recent decision from a three-judge panel ruled what petitioner had always felt the law to be.

> "The claim of plaintiffs that the holding in *Mitchell* has been eroded by the subsequent decisions cited by them is untenable. An inferior court can never 'erode' a decision of the United States Supreme Court." *Broadrick* v. *State of Oklahoma ex rel. The Oklahoma State Personnel Board, et al.,* 338 F.Supp. 711, 716 (W.D. Okla. 1972).

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[4] Cases cited by the United States Court of Claims: *Barnette* v. *West Virginia State Board of Ed.,* 47 F.Supp. 251, 252-53 (S.D. W. Va. 1942) (Parker, J.), *aff'd,* 319 U.S. 624 (1943); *United States* v. *Girouard,* 149 F.2d 760, 765-67 (C.A. 1, 1945) (Woodbury J., dissenting), *rev'd,* 328 U.S. 61 (1946); *Andrews* v. *Louisville & Nashville R.R.,* 441 F.2d 1222 (C.A. 5, 1971), *aff'd,* U.S. Sup. Ct., No. 71-300, *decided* May 15, 1972, 40 LW 4511.

[5] Additional cases cited by the Osage in brief in opposition to petition for certiorari, p. 7; *Rowe* v. *Peyton,* 383 F.2d 709, 714 (4th Cir., 1967),

If the reasoning in *Broadrick, supra,* is correct then the Court of Claims is incorrect in relying on the decisions of the lower courts and administrative practices to reach its decision. The specific effect of the Supreme Court decision in *Squire* v. *Capoeman, supra,* as applied to the *West* decision will be discussed in part II.

II

A careful study of *Squire* v. *Capoeman,* 351 U.S. 1 (1956), is necessary to determine what if any actual effect this decision might have had toward eroding or altering in some manner the tenets of the Supreme Court's decision in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948). This case is particularly significant since it is the only Supreme Court case cited by the United States Court of Claims in *Mason* v. *U. S.,* 461 F.2d 1364 (1972). Mr. Chief Justice Warren, in delivering the opinion of the Court in *Squire,* specified the question considered.

> "The question presented is whether the proceeds of the sale by the United States Government of standing timber on allotted lands on the Quinaielt Indian Reservation may be subject to capital-gains tax, consistently with applicable treaty and statutory provisions and the Government's role as respondents' trustee and guardian." *Squire* v. *Capoeman,* 351 U.S. 1, 2 (1956).

In *Squire, supra,* the respondents were noncompetent Quinaielt Indians, born on the reservation. Pursuant to the

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[5] **(Continued)**
*aff'd,* 391 U.S. 54 (1968); *Browder* v. *Gail,* 142 F.Supp. 707 (M.D. La. 1956), *aff'd,* 352 U.S. 903 (1956); *Perkins* v. *Endicott Johnson Corp.,* 128 F.2d 208, 217-18 (2d Cir. 1942), *aff'd,* 317 U.S. 501 (1943).

General Allotment Act of 1887 the respondents were allotted 93.25 acres af reservation and received a trust patent. The land in question was described as forest land, covered with trees which were in excess of 100 years old, which would have little value after the timber was cut as it was not adaptable to agricultural purposes.

In 1943, the Department of the Interior contracted for the sale of the timber on respondents' land and a long-term capital-gains tax was levied upon the sum received. In refusing to allow the imposition of such a tax, the Supreme Court quoted with approval an opinion of an Attorney General as follows:

> ". . . In other words, it is not likely to be assumed that Congress intended to tax the ward for the benefit of the guardian. [footnote omitted]." *Squire* v. *Capoeman,* 351 U.S. 1, 8 (1956).

The Court further stated:

> ". . . Respondents' timber constitutes the major value of his allotted land. *The government determines the conditions under which the cutting is made.* Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. *It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence.*" *Squire* v. *Capoeman,* 351 U.S. 1, 10 (1956). (Emphasis added.)

After the careful examination of *Squire* recently by the Court of Claims, blessed with these 16 years of changing philosophy with regard to the past treatment of the Indian, the Court indicates that *Squire* made inroads with

regard to the philosophical and legal theories upon which *West* was based. As indicated in part I, Oklahoma does not necessarily disagree with all the concepts of the Court of Claims as set forth in *Mason*. While Oklahoma does not believe that *West* has been overruled by *Squire*, it understands that we are to a stage of thinking in which *West* might be best overruled. However, *West* appears to be the law and should be considered as such without a clear expression from this Court to the contrary. Certainly, there were numerous factual distinctions between *West* and *Squire* which make any statement that *Squire* did in effect overrule *West* opaque at best.

*Squire* v. *Capoeman, supra,* differs markedly on its facts from *West* and is therefore distinguishable from the *West* decision. As Judge Skelton pointed out in his dissenting opinion in *Mason:*

> "In that case *(Squire)*, the court was dealing with a *direct tax* on the property of a *living noncompetent* Indian and no inheritance tax imposed by a state was involved. Furthermore, the tax would be imposed on the property of the wards by their guardian during their lifetime. No such facts exist in *West* nor do they exist in our case." *Mason* v. *U. S.*, 461 F.2d 1364, 1380 (1972). (Pet. App. A-28). (Emphasis added.)

It is evident from reading the *Squire* decision, that the Supreme Court had difficulty in accepting the situation in which the ward was taxed for the benefit of the guardian (351 U.S. at 8). Certainly, this is not the case when Oklahoma is attempting to collect a tax on the estate of a deceased Indian. Also, *Squire* seems distinguishable on its facts in that the incident which gives rise to taxation under

*Squire* was directly under the control and management of the taxing agency (351 U.S. at 10). In the case of the State's taxation on the estate of the deceased Indian, the State exercises no control over the advent of the tax consequence and cannot be said to have the implied power to pick a time advantageous to the State to levy such a tax.

Finally it appears that the Court in *Squire* was concerned by a diminution in value of that which had been allotted the restricted Indian so that "he cannot go forward when declared competent with the necessary chance of economic survival in competition with others" (351 U.S. at 10, cited with approval by the Court in *Mason*). (See Pet. App. A-19.) In the present case as in *West* an estate tax was levied by the State after the noncompetent Indian was deceased. This does not defeat the principle set out by the Supreme Court in *Squire* of attempting to preserve for that noncompetent Indian as much of his allotment as possible. Certainly in *Squire,* the tax was levied on property which would be directly diminished in value as to the noncompetent Indian for whom the property was held in trust. Assuming, *arguendo,* the heirs of the Osage may themselves be Indians who have received their certificate of competency, there is nothing in *Squire* to indicate that there is either a legal or philosophical reason to protect this class of Indian.

In any event it seems clear that the facts in *Squire* are sufficiently distinguishable from those in *West* that a reading of both cases, without anything further, indicate that *West* still governs the factual situation in *Mason.* Moreover, the distinguishing facts are such that even if the in-

roads which the Court of Claims discussed were made as to the legal concepts of *West*, that should not be considered sufficient to charge a fiduciary with a breach of trust in adhering to the *West* decision.

III

Oklahoma contends that the central issue in an Osage recovery is whether the United States violated its duty as a fiduciary in not seeking to overturn the Supreme Court's decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948). The United States indicates this is a primary question in its Petition for Writ of Certiorari (see United States' Petition for Writ of Certiorari, page 2), and Oklahoma will not make an attempt to exhaustively discuss the law regarding the responsibilities of a governmental trustee. This petitioner, like the United States, has been unable to find any precedent for imposing the strict standard on a trustee to which the Court of Claims alludes in the *Mason* decision. A review of the decisions cited by the Court of Claims in *Mason* v. *U. S.*, 461 F.2d 1364, 1372 (1972) (Pet. App. A-14-15) does not reveal an instance in which a fiduciary was charged with an obligation to bring a lawsuit to question the validity of an existing United States Supreme Court decision. The Court also discusses Bogert, Trust and Trustees (2nd Ed. 1959) §602 (at 386), and appears to rely upon the language in that treatise which states:

> "The trustee has a duty to resist the levy and collection of unjust and improper taxes against the trust estate."

The case cited under that statement has no bearing or current application, and it is difficult to imagine that a tax which may be argued to be specifically authorized by a United States Supreme Court decision could be held to be unjust or improper.

As suggested in Part I, it is difficult at best to determine at what point in time the Court of Claims determined the United States breached its trust. The Court of Claims apparently feels that the United States should have brought an action to test *West*, but does not specify when such an action should have been brought. It is clear in its holding in *Mason* that by 1967 or 1968 the Court of Claims felt that the United States had breached its fiduciary relationship with the Osage by not bringing an action to test *West*. The Court stated:

> ". . . For we are satisfied that, by 1967 and 1968 when the tax was handed over, the shadows on that decision *(West)* loom so large that the Government, as fiduciary with the obligation to protect the Indian, should have tested the current acceptability of *West* by challenging collection of the tax. . . ." *Mason* v. *U. S.*, 461 F.2d 1364, 1372 (1972). (Pet. App. A-13).

The shadow to which the Court refers consists of *Squire* v. *Capoeman*, 351 U.S. 1 (1956), two cases decided by the Court of Claims, *Big Eagle* v. *United States*, 300 F.2d 765 (1962), *Beartrack* v. *United States*, Ct. Cl. No. 281-67 (1967) (a case settled by the United States on October 25, 1968), and an internal revenue ruling handed down after the payment of this tax in question on April 7, 1969, in Rev. Rul. 69-164. After recitation of these cases, the Court of Claims stated:

> "From all this, the Department of Interior would have to conclude, in our view, that there was at the very least a serious question whether *West* remains viable and that, as a fiduciary for Rose Mason and her estate, the United States would have to test that issue by protesting the payment of the tax and litigating its applicability. (By footnote, the Court pointed out that the federal government brought a suit to recover the inheritance taxes imposed by Oklahoma in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598.)" *Mason* v. *U. S.*, 461 F.2d 1364, 1372 (1972). (Pet. App. A-14).

It would appear that if the Court of Claims is correct in its analysis of the trustees' obligation, then in effect the trustee has a continuing obligation to be constantly testing by litigation any court decision that might possibly affect a decision upon which the trustee relies. A trustee could have no feeling of security in reliance upon any case decisions, even those of the United States Supreme Court.

Once deciding that the United States did in fact breach its fiduciary relationship with the Osage Indian by not refusing to pay to the State of Oklahoma the estate tax or otherwise testing the *West* decision, the Court holds the State of Oklahoma liable to the United States.

> "If, as we have just held, the Oklahoma estate tax should not have been paid or collected with respect to this Indian trust and restricted property, the State is liable over to the United States, which, as trustee, improperly paid the tax. As trustee, the United States can sue for return of the money." *Mason* v. *U. S.*, 461 F.2d 1364, 1379 (1972). (Pet. App. A-25).

If the Court of Claims is correct in its holding, then a serious detriment to the State of Oklahoma has occurred.

The impact of the *Mason* decision though of minor monetary consequence initially will by its application to the case of *Wilson* v. *U. S., supra* (the class action on behalf of all the remaining restricted Osage Indians) create a monetary consequence which will be significant to the State. Although the ultimate exposure in this matter was not determined by the Court of Claims in *Mason,* it is possible that the State of Oklahoma might have to repay all taxes collected from restricted Osage Indians back to 1956, which will unquestionably be several million dollars. Practically, it is difficult for a State, once money has been collected and placed into the general fund, to make restitution of such a sum of money out of one year's budget. Additionally, any attempt to recover interest on the tax payment by the Osage from the United States which is passed along to the State of Oklahoma in effect would penalize the State as the result of acts over which she had no control. (The Osage has sought these interest payments in *Wilson, supra.*) This Court has spoken to this problem in a case of substantially the same import wherein it stated:

> ". . . Whatever may be her (Jackson County, Kansas) unfortunate duty to restore the taxes which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers." *Board of County Commissioners of the County of Jackson, et al.* v. *United States of America, et al.,* 308 U.S. 343 (1939).

While the Osage contend that a discussion of the matters just presented are premature, it would seem proper for this Court to determine not only if the United States

did breach its fiduciary duty, but to also determine the extent of the State of Oklahoma's possible exposure by specifying the time in which the breach occurred and whether or not the State of Oklahoma might be liable for the interest payment.

## CONCLUSION

Irrespective of the Court's determination as to the present acceptability of *West* v. *Oklahoma Tax Commission, supra,* the United States did not breach its fiduciary relationship with the Osage Indian. No breach in fact occurred and the United States is not liable to the Osage Indian, nor is the State of Oklahoma liable to the United States. The State of Oklahoma asks that this Court reverse the ruling of the United States Court of Claims in *Mason* insofar as that Court found any breach of duty to have occurred, and thereby set aside that Court's judgment allowing recovery by the Osage against the United States and a recovery over by the United States against the State of Oklahoma.

Respectfully submitted,

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February, 1973

**CERTIFICATE OF SERVICE**

I hereby certify that on this ..... day of February, 1973, three copies of the Brief of Appellee were mailed, with postage prepaid thereon, to all parties required to be served as follows:

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# INDEX



CITATIONS





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Cases—Continued

Miscellaneous:

# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–654

UNITED STATES OF AMERICA, PETITIONER

*v.*

ARCHIE L. MASON, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (Pet. App. A) [1] is reported at 461 F. 2d 1364.

### JURISDICTION

The judgment of the Court of Claims was entered on June 16, 1972. Pursuant to orders extending the time within which to file a petition for a writ of certiorari, petitions were filed by the State of Oklahoma (No. 72–606) and the United States (No. 72–654) on October 16, 1972, and October 27, 1972,

[1] For convenience we shall refer to the appendix in No. 72–606 as "Pet. App."

respectively. Both petitions for certiorari were granted on January 15, 1973, and the cases were consolidated. This Court's jurisdiction rests on 28 U.S.C. 1255(1).[2]

## QUESTIONS PRESENTED

1. Whether the United States as trustee is liable to the estate of a restricted Osage Indian for breach of fiduciary duty because it paid State inheritance taxes to the State of Oklahoma in 1967 and 1968 from funds of the estate, as required by this Court's decision in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717, instead of attempting to have *West* overruled.

2. Whether *West* v. *Oklahoma Tax Commission* should be overruled.

## STATEMENT

Under the Osage Allotment Act of 1906, 34 Stat. 539, Osage tribal lands were alloted to the enrolled tribal members but subject to restrictions on alienation until the owners receive certificates of competency. The Act provides for a delayed allotment of the Tribe's mineral interest. Until the trust period expires in 1984, the interests are to be held by the Tribe subject to federal supervision but during that time the revenues from the mineral interests are to be held in trust by the United States for the members of the Tribe with periodic distribution of royalties to the

[2] 28 U.S.C. 1255 does not on its face provide for a third-party defendant in the Court of Claims, like the State of Oklahoma, to petition for certiorari. However, 41 U.S.C. 114 (b) states that such third-party defendants shall be treated for all purposes as claimants, and 28 U.S.C. 1255(1) specifically allows claimants to petition for certiorari.

members. 34 Stat. 543–544. Other tribal funds, including the proceeds of sales of tribal lands in Kansas, are also to be held in trust by the United States. 34 Stat. 544. The Act provides that the lands, moneys and mineral interests of any deceased Osage shall, with certain exceptions, descend to his legal heirs according to the law of what is now the State of Oklahoma. 34 Stat. 545. At the termination of the trust, as now extended to 1984 (52 Stat. 1034, Sec. 3), "the lands, mineral interests, and moneys * * * held in trust by the United States shall be the absolute property of the individual members of the Osage tribe * * * or their heirs." 34 Stat. 544. The present right of a tribal member in this trust fund is commonly referred to as his "headright."

Amendments to the Osage Allotment Act in 1912 and in 1947 (37 Stat. 86, 88; 61 Stat. 747) specify that the land and funds held in trust or under restriction "shall not be subject to lien, levy, attachment, or forced sale * * * prior to the issuance of a certificate of competency." 61 Stat. 747.

In 1948, this Court held in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717, that the State of Oklahoma could lawfully levy inheritance taxes on the transfer of the estates of retricted Osage Indians, including the portions of such estates held in trust by the United States, upon the death of the beneficial owner. The trust properties in *West,* as in the present case, consisted of headrights in Osage mineral interests, and other tribal funds and re-investments of funds.[3]

[3] Compare Pet. App. A–4 with 334 U.S. at 719.

In 1967 and 1968, after the death of Rose Mason, a non-competent Osage Indian domiciled in Oklahoma, the Osage Agency of the Bureau of Indian Affairs, Department of the Interior, acting in accordance with this Court's decision in *West*, paid to the Oklahoma Tax Commission $8,087.10 in inheritance taxes on the passage of her estate to her heirs at law (Pet. App. A–4). These payments were made out of trust funds of the decedent held by the government as trustee. In November 1970 the administrators of her estate brought the present suit against the United States in the Court of Claims, alleging that the decision in *West* had been so weakened by subsequent cases that the United States, as a fiduciary, was obliged to challenge the tax, and not to pay it (Pet. App. A–5). To support their contentions, the administrators of the Mason estate chiefly relied on this Court's decision in *Squire* v. *Capoeman*, 351 U.S. 1, and subsequent decisions by courts of appeals and revenue rulings by the Treasury Department.

The Court of Claims, acknowledging that *West* "is the last word from the Supreme Court directly on point" (Pet. App. A–9), nevertheless agreed with the administrators and held that: "the *West* result is no longer controlling * * *" (Pet. App. A–24), that the government's payment of the tax without challenge was a breach of its fiduciary duty to the Mason estate, that the measure of damages is the full amount of tax paid, and that the United States is liable in that amount to the estate. It further held that the United

States is entitled to be indemnified by the State of Oklahoma in the same amount.

## SUMMARY OF ARGUMENT

I. The United States did not violate its duty to the estate of Rose Mason by paying the Oklahoma inheritance tax assessed against her estate. While a trustee has a duty to preserve the trust estate, part of this duty is to pay taxes as they come due. This Court had previously held in *West* v. *Oklahoma Tax Commission,* 334 U.S. 717, that the identical trust is not exempt from Oklahoma inheritance taxes. A subsequent decision, *Squire* v. *Capoeman,* 351 U.S. 1, held that the General Allotment Act, 24 Stat. 388, 25 U.S.C. 331 *et seq.,* provides a certain immunity from federal income taxation but did not overrule or question *West.* In 1967 and 1968, when the United States paid these taxes, a number of the decisions and executive actions relied upon by respondent had not yet occurred. The decision to pay the tax was, consequently, a proper exercise of discretion by the trustee.

II. There has long been a distinction between taxes on property and taxes on the transfer of property, particularly the transfer which occurs at death. On this basis the decision in *West* is distinguishable from *Squire.*

It is clear, however, that the approach taken by the Court in *Squire* was different from that of *West* and that this difference has had its effect on lower court decisions and executive actions. Whether *West*

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has in fact been impaired, and, if so, whether that impairment is fatal to its continued vitality, can only be determined by this Court. The question of the right of Oklahoma to tax estates such as this will arise regularly during the course of the trust. It is important, therefore, that the law be clarified.

## ARGUMENT

### I. THE UNITED STATES DID NOT VIOLATE ITS DUTY AS TRUSTEE IN PAYING THE OKLAHOMA INHERITANCE TAX ASSESSED ON THE ESTATE OF ROSE MASON IN ACCORDANCE WITH THIS COURT'S DECISION IN WEST V. OKLAHOMA TAX COMMISSION

1. The Court of Claims has held that the United States is surchargeable for the entire amount of the estate taxes paid by the government in its capacity as trustee in conformity with an outstanding decision of this Court squarely holding the trust liable for the taxes. Not only did the Court of Claims forecast that this Court will overrule the otherwise controlling decision but it also concluded that the government's conduct in failing to seek the overruling constituted a breach of the fiduciary duty to exercise good faith and reasonable competence. This ruling by the court below lacks support in general trust law or in either the historic or the current relationship between the federal government and Indian trusts.

Whether *West* v. *Oklahoma Tax Commission,* 334 U.S. 717, is ultimately reaffirmed or overruled by this Court, the decision of the Court of Claims holding the government liable for breach of fiduciary

duty should be reversed. The relevant general principle has been stated as follows: "A trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."[4] The United States has not violated this duty of care. It is, of course, correct that the government had a fiduciary duty to preserve the estate of Rose Mason—not to pay a tax that is clearly not owed. But as with any prudent trustee, the government as trustee also has the duty to pay taxes as they come due:

> Similarly the trustee is under a duty to protect the trust property by paying taxes thereon. If he has funds available for the purpose and fails to pay the taxes with the result that the land is sold, the trustee is subject to a surcharge. So also if owing to the negligence of the trustee in delaying the payment of taxes penalties are incurred, the trustee is subject to a surcharge for the amount of the penalties.[5]

The decision whether to pay a tax, or to contest it, thereby risking penalties and litigation costs and expenses, is thus not a simple one. The competing considerations require that the trustee have a "certain amount of discretion"; in accordance with the traditional standard of fiduciary responsibility, the trustee will be held liable to a surcharge "only if he abuses the discretion by failing to do what is reasonable un-

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[4] 2 Scott, *The Law of Trusts* (3d ed.), § 174, p. 1408. See also Bogert, *Trusts and Trustees* (2d ed.), § 582, p. 216. These treatises are hereinafter cited as "Scott" and "Bogert" respectively.

[5] 2 Scott, § 176, p. 1422. See also Bogert, § 602, p. 383.

der the circumstances."[6] Professor Scott explains, with particular relevance to the present case:

> * * * He [the trustee] does not necessarily act unreasonably in paying a claim, even though he believes that the claim is not well founded, if under all the circumstances, in view of the amount involved and the doubt as to the issue, it appears to be not unreasonable to pay the claim. Thus it has been held that where the question of the liability of the trust estate for an inheritance tax in another state for a small amount was debatable and it would cost more than the amount of the tax to litigate the question, the trustee was not subject to a surcharge for paying the tax, even though in fact the estate was not subject to the tax.[7]

2. In order to consider whether the government has failed to meet its fiduciary responsibility by paying Oklahoma estate taxes out of Rose Mason's share of the Osage trust, it is therefore essential to consider the circumstances at the time the government acted to pay these taxes in 1967 and 1968.

In *West,* decided in 1948, this Court held that Oklahoma can assess its inheritance tax on the transfer at death of Osage headrights. The fund and the tax were the same as those now before the Court. Relying on its earlier decision in *Oklahoma Tax Commission* v. *United States,* 319 U.S. 598, the Court found that Congress had not provided an express immunity from taxation

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[6] 2 Scott, § 178, p. 1428.

[7] 2 Scott, § 178, pp. 1428–1429, citing *Selleck* v. *Hawley,* 331 Mo. 1038, 1056, 56 S.W. 2d 387, 395–396; *Patterson* v. *Vivian,* 137 App. Div. 596, 122 N. Y. Supp. 347. See, also, Gross, *Liability of Trustees for Inheritance Taxes of Foreign States,* 96 Trusts & Estates 444 (1957).

in the Osage Allotment Act (334 U.S. at 727–728) and that it could not imply such an immunity. The Court also distinguished between a tax on the trust fund itself and a tax on the transfer of the property to another (334 U.S. at 727), though it was aware that the economic effect of either tax could be the depletion of the trust corpus (*id.* at 725–726).[8]

Seven years later, without any reference to *West*, the Court decided *Squire* v. *Capoeman*, 351 U.S. 1, which the court below concluded "seriously weakened or eroded" the decision in *West* (Pet. App. A–18). In *Squire* this Court held that, despite the absence of an express tax exemption, the government's statutory duty under the General Allotment Act of 1887, 24 Stat. 388 (25 U.S.C. 331 *et seq.*) to return lands to Indian allottees free of any lien or encumbrance[9] prohibited the United States from assessing a capital gains tax on the profit resulting from the government's sale of timber produced on the allotted trust land. The Court stated that "to protect the Indians' interest * * * it is necessary to preserve the trust and income derived directly therefrom, but it is not necessary to exempt reinvestment income from tax burdens." 351 U.S. at 9. The Court also relied on language in an amendment to the General Allotment

[8] In *Oklahoma Tax Commission* v. *United States*, the government had argued that the State of Oklahoma is without power to impose a tax upon the transfer of restricted property of members of the Five Civilized Tribes, including restricted funds managed by the United States. The Court ruled against the government. In *West*, the Court found no practical difference between restricted funds and funds held in trust.

[9] The Osage Allotment Act contains similar, though not identical, language, see p. 3 *supra*.

Act providing for taxation of the land after the allottee receives a patent in fee. 351 U.S. at 7.[10]

While *Squire* contains broad and important language concerning implied tax immunities on restricted or trust property (see, *e.g.*, 351 U.S. at 6–7), it is essentially a decision concerning federal income taxation on income derived from allotted lands, preventing the government from collecting a tax on the gain resulting from a sale of timber from such land.

We doubt that anyone in 1955 thought that *Squire* was so inconsistent with *West* that it could be taken as tacitly overruling that case. Indeed, in *Kirkwood* v. *Arenas*, 243 F. 2d 863, decided shortly after *Squire*, and also relied on by the court below (Pet. App. A–10, A–12), the Ninth Circuit held California inheritance taxes inapplicable to trust allotments of Agua Caliente Indians but carefully distinguished *West* as based on an allotment act not conferring the tax exemption that was provided by the General Allotment Act as made applicable to the lands of the Agua Caliente Indians in that case by the Mission Indian Allotment Act.

We recognize that *Squire* v. *Capoeman* has been extended by lower courts to other related contexts. Thus, while that decision involved the federal capital gains tax on a sale of timber, the Court of Claims in 1962 held that under *Squire* income from Osage headrights is exempt from federal income taxation. See

[10] The Osage Allotment Act does not contain such language as to headrights but does as to allotments of land. 34 Stat. 542. See *West* v. *Oklahoma*, *supra*, 334 U.S. at 724–725.

*Big Eagle* v. *United States*, 300 F. 2d 765. See, also, *United States* v. *Hallam*, 304 F. 2d 620 (C.A. 10).

The United States has also interpreted *Squire* generously but not as generously as the Court of Claims. In 1959, the Treasury Department ruled on the basis of *Squire* that income derived by an Indian directly from trust land held under the General Allotment Act or similar acts would not be subject to federal income taxation. Rev. Rul. 59–349, 1959–2 Cum. Bull. 16. This ruling was repeated and refined in 1967 in Rev. Rul. 67–284, 1967–2 Cum. Bull. 55. In the meantime, it had been held in *Nash* v. *Wiseman*, 227 F. Supp. 552 (W. D. Okla.), in 1963 that under *Squire* allotted land and trust fund cash held by the government for a restricted Indian are not subject to federal estate taxation. In 1967 the issue as to federal estate tax was again in litigation in the Western District of Oklahoma and in January 1968 was decided adversely to the government in *Asenap* v. *United States*, 283 F. Supp. 566. It was during this period, 1967–1968, that the United States paid the Oklahoma inheritance tax on the Mason estate. Not until 1969, after the government paid the state inheritance taxes at issue in the present case, did the Internal Revenue Service conclude that the rationale of *Squire* should apply to federal estate taxes as well as to income taxes. Rev. Rul. 69–164, 1969–1 Cum. Bull. 220.

3. To recapitulate, at the time the government, acting as trustee, paid $8,087 in Oklahoma inheritance taxes in 1967 and 1968, this Court's decision in *West* v. *Oklahoma Tax Commission* holding Oklahoma inheritance taxes applicable to the transfer of Osage headrights was unquestioned by any later decision of this

Court. A subsequent case, *Squire* v. *Capoeman*, had recognized an immunity from *federal income* taxation as being implicitly created by the General Allotment Act. The Treasury Department and the lower courts were defining the extent of the exemption as applied to different kinds of income and different allotment acts. The question whether *Squire* had any effect on the right of the federal government to collect estate taxes on allotted lands and shares in trust funds was being litigated. And not until after these taxes were paid did the government conclude that federal estate taxes were not applicable to such property. The one case (*Kirkwood* v. *Arenas, supra*) holding that state inheritance taxes could not be assessed against restricted lands had carefully distinguished *West*, implicitly conceding its vitality on its facts.

Moreover, though individual Indians are free to contest payments of taxes out of trust funds and there is a vigorous bar ready to handle such cases (*West* itself was such a case, as is the present one), no individual suit had been brought contesting the obligation of the United States to obey the *West* decision in administering Osage trust funds.

Under these circumstances, we submit, it would have been at least a serious question whether a prudent trustee could properly have refused to pay the tax. A refusal to pay, if not ultimately sustained, would have exposed the trust to penalties and other clouds. Seeking a judicial test of *West* would necessarily have had to be pressed for ultimate consideration by this Court, and would have meant long and costly litigation. Unless the government is to be held to something akin to

an insurer's absolute liability rather than to the standard of good faith competence applicable to trustees in general, we submit that there was no warrant for finding that a fiduciary duty was violated in not challenging this Court's decision in *West*. Under all the circumstances, the course taken by the government was within the range of reasonable options open to a prudent trustee, and the surcharge for the amount of the taxes paid was improper.[11]

II. THE QUESTION OF THE CONTINUED VALIDITY OF THE OKLAHOMA INHERITANCE TAX ON THE TRANSFER OF OSAGE TRUST PROPERTY SHOULD BE DECIDED BY THIS COURT

On the underlying question in this case, the Department of Justice is in a difficult position. On the one hand, it represents the Department of the Interior, which has a fiduciary responsibility to the Osage Indians, and particularly to the respondents here, who are administrators of the estate of a deceased Osage Indian. On the other hand, the Department has a professional, and thus a fiduciary, responsibility to the United States, and, in an appreciable sense, to the law. An overruling of this Court's decision in *West* v. *Oklahoma Tax Commission*, 334 U.S. 717, might well have an adverse impact on the

[11] To the extent the Court affirms all or part of the surcharge imposed by the Court of Claims, the government stands by that part of the decision below (Pet. App. A–25) that grants judgment to the government on its third-party complaint against the State of Oklahoma, also a petitioner before this Court, for reimbursement of any taxes held to have been erroneously paid.

revenue interests of the United States under such cases as *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, which was one of the authorities on which this Court relied in reaching its *West* decision. As this Court said, speaking through Mr. Justice Black, in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 610:

> Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, permitted states to impose income taxes upon government employees, and *Helvering* v. *Gerhardt*, 304 U.S. 405, permitted the federal government to impose taxes on state employees. *O'Malley* v. *Woodrough*, 307 U.S. 277, overruled a previous decision which held that judges should not pay taxes just as other citizens, and *Helvering* v. *Mountain Producers Corp., supra*, repudiated former decisions seriously limiting state and federal power to tax. See also *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, and *James* v. *Dravo Contracting Co.*, 302 U.S. 134. The trend of these cases should not now be reversed.

Thus there is a clear conflict of interest. If there were a way to avoid it, it should be followed. The President has recommended the establishment of an Indian Trust Counsel Authority, with broad powers to represent the interests of Indians, in all courts, state and federal. See "The American Indians—Message from the President of the United States," 116 Cong. Rec. 23,131 (1970). But no such authority has been established.

In this situation, the only resolution seems to be for the Department to try to present the questions as fairly as possible, without advocacy one way or the other, in the hope that it may be of some assistance to the Court in coming to a conclusion.

There has long been a distinction in our law between taxes on property, and taxes on the transfer of property, particularly the transfer which occurs at death. Thus, in *Plummer* v. *Coler,* 178 U.S. 115, the Court sustained a state inheritance tax as applied to the value of federal bonds, although Congress had by the Act of July 14, 1870, under which the bonds were issued, declared "that the principal and interest were exempt from taxation in any form by or under state, municipal or local authority" (178 U.S. at 118), and this was only a few years after a similar constitutional immunity had been declared in *Pollack* v. *Farmers Loan and Trust Co.,* 157 U.S. 429, 584. See also *Murdock* v. *Ward,* 178 U.S. 139, holding that similar bonds, with a similar statutory tax exemption, could be subjected to a federal inheritance tax. In *Greiner* v. *Lewellyn,* 258 U.S. 384, the Court held that the federal estate tax could be applied to bonds issued by state municipalities. In *United States Trust Co.* v. *Helvering,* 307 U.S. 57, the Court held that proceeds of war risk insurance were subject to the federal estate tax despite a provision in the statute that such "insurance . . . shall be exempt from all taxation."

In 1943, in *Oklahoma Tax Commission* v. *United States, supra,* the United States argued, in a detailed brief, that Oklahoma inheritance taxes could not be

applied to restricted Indian lands and funds.[12] The United States argued that "in the absence of congressional authority no state can use these lands as the subject or the measure of a tax" and that as to the Oklahoma inheritance tax "(1) the tax itself, (2) the lien of the tax, and (3) certain of its administrative features, are each contrary to the Federal restriction" (Br. p. 71). The Court, however, decided to the contrary, allowing the application of the state inheritance tax to restricted lands and funds as to which there was no express tax exemption.

Thereafter, in *West,* the Court refused to distinguish for tax purposes between restricted funds, which were at issue in *Oklahoma Tax Commission,* and trust funds, which are at issue here and in *West.* The Court recognized in *West* that "[i]f the estate is to be tapped repeatedly by Oklahoma until 1984 by the deaths of the various heirs, the result may be a substantial decrease in the amount then available for distribution." 334 U.S. at 726. Nevertheless, the Court declined to hold the Oklahoma tax inapplicable to these funds.

Twenty-five years have passed since *West* was decided. Although Congress rarely acts on such matters, its inaction here may possibly be of some significance.

Although the decision in *West* seemed definitive, there have been currents in the other direction since *West* was decided. In 1956, the Court decided *Squire* v. *Capoeman,* 351 U.S. 1, in an opinion by Chief Justice Warren. That case involved the federal income

[12] See Brief of the United States, Nos. 623–625, October Term, 1942.

tax as applied to a capital gain resulting from the sale by the government of standing timber on allotted forest land on an Indian reservation, held in trust for an Indian. In denying the tax, the Court held that an amendment to the General Allotment Act created a tax exemption by implication, in that it required the return of the trust property without encumbrances at the end of the trust period, and provided for taxation after the termination of the trust. Moreover, the general purport of the decision is one of liberality in finding tax immunity where Indian property is concerned.

Thereafter, the Court of Claims in *Big Eagle* v. *United States,* 300 F. 2d 765, held that the Osage Allotment Act—at issue here—is, for tax purposes, essentially indistinguishable from the General Allotment Act, and provides the same immunity against federal income taxation that this Court found in *Squire* v. *Capoeman.* The United States, in the compromise of *Beartrack* v. *United States,* No. 281–67, in the Court of Claims and in Rev. Rul. 69–164, 1969–1 Cum. Bull. 220, has accepted this position and no longer seeks to assess its income taxes against revenues produced by Osage headrights or to assess an estate tax against these headrights, except for earnings on reinvestment.

No decision of this Court has referred disparagingly to *West* v. *Oklahoma Tax Commission, supra.* And it is clear that the *West* decision, as a precedent, is distinguishable from that reached in *Squire* v. *Capoeman, supra,* since *West* involved a state inheritance tax on the transfer of property held in trust for Osage

Indians, while *Squire* involved a federal income tax on the gain from the sale of allotted property held in trust for a Quinaielt Indian, involving different statutory provisions.

It is equally clear, though, that the approach taken in *Squire* was different from that which had been followed in *West* less than eight years previously. This difference in approach has had its impact both on lower courts and, as a result of these lower court decisions, on the Executive branch of the government. Whether *West* has in fact been impaired, and, if so, whether that impairment is fatal to its continued vitality can only be determined by this Court. In this connection, it may be observed that *Squire* v. *Capoeman* expressly declined to establish a tax exemption for reinvested property; thus if *Squire* is held to vitiate *West*, the question still remains how much of the Mason estate may now enjoy an exemption from Oklahoma inheritance taxes.

The Osage trust, unless modified by Congress, will remain in effect until 1984. During that time the question of the right of Oklahoma to tax estates such as this will arise regularly. It is important, therefore, that the law be clarified so that the United States, as trustee, may know whether it remains bound to pay such taxes, and if so, on what portions of the decedents' estates.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims against the United States should be reversed.

Respectfully submitted.

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MARCH 1973.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-606

STATE OF OKLAHOMA,
*Petitioner,*

v.

ARCHIE L. MASON, ET AL.,
*Respondents.*

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No. 72-654

UNITED STATES OF AMERICA,
*Petitioner,*

v.

ARCHIE L. MASON, ET AL.,
*Respondents.*

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## BRIEF FOR RESPONDENTS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-606

STATE OF OKLAHOMA,
*Petitioner,*
v.
ARCHIE L. MASON, ET AL.,
*Respondents.*

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No. 72-654

UNITED STATES OF AMERICA,
*Petitioner,*
v.
ARCHIE L. MASON, ET AL.,
*Respondents.*

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## BRIEF FOR RESPONDENTS

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Respondents Archie L. Mason and Margaret R. Mason, administrators of the estate of Rose Mason, herewith file their brief in these consolidated cases, in answer to the briefs filed herein by the State of Oklahoma and the United States.

### STATEMENT

The statements of the case submitted by the State of Oklahoma and the United States, while substantially accurate, do not fully set forth all the necessary facts. The deficiency lies in two principal areas: (a) new issues raised here by Oklahoma, and; (b) facts relating to the

finding of liability against the United States. To complete the factual record, the following matters should be considered:

1. *Issues raised here by Oklahoma.* For reasons of its own, Oklahoma chose to submit no evidence or file any briefs or memoranda in the litigation below. The only filings made by Oklahoma were its Answer to the Third-Party Petition of the United States and a one-page, two-line "Statement", filed on July 15, 1971. The docket entries show that Oklahoma was fully served with all pleadings and orders. Except for an unannounced appearance at oral argument, the State of Oklahoma made no evidentiary or other presentation below.

2. *Liability of the United States.* Payment of the Oklahoma death taxes at issue here was made by the United States in September, 1967 and December, 1968. The United States paid these taxes without protest and at no time sought a refund of same.

*Prior* to the payment of these taxes, the United States was on notice that federal courts had construed this Court's decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956) as exempting Indian trust properties from federal estate tax[1] and from state inheritance tax.[2] The United States was further on notice that in August, 1967, suit had been filed in the Court of Claims (*Beartrack* v. *United States*, Ct.Cl. No. 281-67) for refund of federal estate taxes paid with respect to restricted trust properties of an Osage decedent and that this suit was settled by a full refund of federal estate taxes paid on October 25, 1968.

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[1] *Nash* v. *Wiseman*, 227 F. Supp. 552 (W.D. Okl. 1963); *Asenap* v. *United States*, 283 F. Supp. 566 (W.D. Okl. 1968). *Asenap* was decided in January, 1968 and final payment of Oklahoma estate taxes in the instant case was not made until December, 1968.

[2] *Kirkwood* v. *Arenas*, 243 F. 2d 863 (9th Cir. 1957).

*Shortly after* the December, 1968 payment of Oklahoma taxes, the Internal Revenue Service issued a Revenue Ruling (on April 7, 1969) holding that the *Capoeman* rationale immunized Indian trust properties held under the General Allotment Act from federal estate taxation.[3] This was followed by issuance of an IRS Technical Advice Memorandum (on August 15, 1969) specifically holding that the principles of the foregoing Revenue Ruling were fully applicable to trust properties held under the Osage Allotment Act.[4]

## SUMMARY OF ARGUMENT

I. *West* v. *Oklahoma Tax Comm'n*, 334 U.S. 717 (1948) was effectively, but not expressly, modified by this Court's later decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956). The *Capoeman* decision wholly undercut one of the basic decisional premises of *West*, thus removing its precedential value in at least one vital respect, namely, on the question of whether Osage trust property is subject to "direct" taxes. The unanimous interpretation of the effect of *Capoeman* by the lower federal courts and by the Justice Department, the Interior Department and the Internal Revenue Service confirms that *Capoeman*, not *West*, is the controlling precedent in the instant case. While the *Capoeman* case dealt with the provisions of the General Allotment Act, the Osage Allotment Act is essentially indistinguishable for tax purposes, and so property held in trust under either Act would be equally exempt from taxes.

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[3] Rev. Rul. 69-164, 1969-1 Cum Bull. 220. The Ruling stated, in pertinent part:

> The *Capoeman* case is considered by the Internal Revenue Service to support an exemption from an estate tax because imposing a Federal estate tax is as likely to deplete the property that the United States has undertaken to convey undiluted and undiminished as imposing an income tax.

[4] This Memorandum was referred to by the Court of Claims, 461 F. 2d at 1371 and a copy was attached to our Cross Motion for Summary Judgment.

II. The Court of Claims properly found that the United States was liable for breach of fiduciary duty for failure to act to protect the trust property of its Osage wards. When, as trustee, it paid the tax to Oklahoma in the instant case, the United States was fully aware of the pervasive impact of the *Capoeman* decision, and of the six lower federal court decisions which held that Indian trust property was free from federal and state taxation under the *Capoeman* principles. One of those cases (*Big Eagle*, 1962) actually dealt with Osage trust property, with respect to federal income taxes. In a seventh case, also involving Osage trust property (*Beartrack*, 1968), the United States confessed error and refunded federal estate taxes in that case, and, eventually, all other Osage claims like it. In other words, with respect to *this very tribe* the United States well knew about the effect of *Capoeman*.

Since all the foregoing facts and actions occurred prior to or shortly after the payment of taxes in the instant case, the failure of the United States to take *any* action to contest imposition of taxes on the trust property of Rose Mason was a breach of fiduciary duty to which liability attaches.

III. Several questions raised in the briefs of petitioners were not litigated below or were not raised by the facts of this case. These questions should not be considered for the first time here.

IV. The State of Oklahoma is without jurisdiction to tax Osage trust property. Reference to the relevant statutes and treaty indicate that jurisdiction over the Osage trust estate has never been conferred on Oklahoma. The statutes and treaty leave the trust estate to the exclusive province of the United States and the Osage Tribe. Under *McClanahan* v. *Arizona State Tax Comm'n*, decided March 27, 1973, imposition of Oklahoma taxes on this property is impermissible.

## ARGUMENT

### I. *WEST* v. *OKLAHOMA TAX COMM'N* SHOULD BE EXPRESSLY MODIFIED.

Except for the *West* case it would be quite clear that the Mason property is not subject to state death taxes. This property is held in trust by the United States under the Osage Allotment Act, which is in the most significant respects the same as the General Allotment Act and entitled to the same tax treatment.[5] The United States concedes, in light of *Capoeman*, that the property is not subject to federal income and death taxes,[6] and that being so, *a fortiori* cannot argue, except based on a blind adherence to the *West* case, that it is subject to state income and death taxes.

We feel it is very probable, if not morally certain, that the *West* case would have come to the opposite conclusion if the Court had been able to take for granted, as an underlying assumption, that the *West* property was *not* subject to *federal* income and death taxes. For, if immune from *federal* taxes, it would *a fortiori* be immune from *state* taxes. On the other hand, assuming the property *was* subject to federal income and death taxes, as the Court did assume (see Court of Claims opinion below, 461 F.2d at 1376), it was almost inevi-

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[5] *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F. 2d 765 (1962) so held as to federal income taxes. See also *Kirkwood* v. *Arenas*, 243 F. 2d 863 (9th Cir. 1957) and *United States* v. *Hallam*, 304 F. 2d 620 (10th Cir. 1962), construing other allotment acts as *in pari materia* with the General Allotment Act for tax exemption purposes.

[6] The United States no longer collects such taxes from restricted Osages, after having conceded the income tax, and the validity of *Big Eagle*, note 5 above, in *Baconrind* v. *United States*, Ct. Cl. No. 310-66, and having conceded the death tax in *Beartrack* v. *United States*, Ct. Cl. No. 281-67, both settled by stipulation. See also IRS Technical Advice Memo. Aug. 15, 1969, note 4 above.

table to conclude that it was subject to state taxes as well.

This Court in *West* was perfectly correct when it concluded that—

> ". . . should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes." 334 U.S. at 727-8.

But this Court's further assumption that "No such properties are here involved" has been shown in light of later holdings of this Court to be mistaken. The Court should now correct this part of its *West* decision. We assume that exemption from death and income taxes constitutes, or implies exemption from "direct" taxes.

If the Court will consider, first, what *West* and the earlier precedent of *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598 (1943) (relied upon extensively in *West*) held, and, secondly, what impact the subsequent *Squire* v. *Capoeman* decision had on these holdings, we believe it will agree that *West* must be modified.

A basic holding of the *West* and *Oklahoma Tax Comm'n* cases was that the tax immunity of restricted Indian property could not be based on the "federal instrumentality doctrine",[7] a holding which was recently reiterated by the Court in *McClanahan* v. *Arizona State Tax Comm'n*, decided March 27, 1973. Slip Op. at 6 n.5. We do not question this holding.

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[7] It had formerly been held, in cases such as *United States* v. *Rickert*, 188 U.S. 432, 437-38 (1903) that the Indian property was exempt from state and local taxes for the reason that this would constitute a tax on "an instrumentality employed by the United States for the benefit and control of this dependent race. . . ." It should be noted that the alternative holding in *Rickert*, that tax immunity was to be implied from the government's undertaking to keep intact the trust estate, was reconfirmed in *Squire* v. *Capoeman*.

*West* and *Oklahoma Tax Comm'n* departed, however, from the traditional liberal interpretation of the statutory and treaty rights of Indians and held that a clear, express showing of a grant of tax immunity must be made.[8] The *West* opinion also contained certain language which appeared to minimize or relegate to a subordinate consideration the government's trust responsibility and undertakings with respect to Indian property. (See 334 U.S. at 727). Both of these holdings were ignored, and the opposite held, by this Court in the *Capoeman* decision,

In *Squire* v. *Capoeman*, the Court held that the taxability of Indian trust properties could not be considered separate and apart from the treaties and statutes relating to such properties and the government's undertaking with respect thereto. 351 U.S. at 6. In considering whether the General Allotment Act should be construed as conferring tax immunity in that case, the Court reasserted the traditional policy of judicial interpretation concerning Indian rights and immunities,[9] a policy which was not apparent in *West* and *Oklahoma Tax Comm'n*. Applying the liberal approach required by the traditional rule, the Court concluded that immunity from federal income taxation could be implied from the promise of the General Allotment Act that the trust property would be transferred "free of all charge or incumbrance" at the end of the trust period and the further provision that restrictions as to sale, incumbrance

[8] See 334 U.S. at 727; 319 U.S. at 607. The majority opinion on this point in *Oklahoma Tax Comm'n* prompted a vigorous dissent by Mr. Justice Murphy, joined by Chief Justice Stone, Mr. Justice Reed and Mr. Justice Frankfurter on the ground that the majority opinion "rejected a century and a half of history." 319 U.S. at 612.

[9] The Court quoted extensively from *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), which was again cited with approval in the Court's recent *McClanahan* opinion. See Slip Op. at 11.

or taxation would be removed at the termination of the trust. *Id.* at 6-8.

The Court emphasized the government's obligation with respect to preservation of the trust property and held that this commitment to keep the property intact carried with it an implicit tax immuntiy. *Id.* at 9-10. The Court concluded that the social goals sought to be gained from a system of trusteeship of Indian properties would be frustrated by taxation of these properties during the trust period. *Id.* at 10.

*Squire* v. *Capoeman* thus presented a wholly different approach to the issue of taxation of Indian trust properties than *West* or *Oklahoma Tax Comm'n.* Under the *Capoeman* decision, judicial inquiry into the taxability of Indian property must include a review and analysis of the treaties and statutes pertinent to the terms and conditions under which the United States holds that property or by or under which its use by Indians is restricted. Of controlling significance is the government's undertaking with respect to that property and the congressional purpose to be discerned through its restrictions on Indian properties.

The Osage Allotment Act, 34 Stat. 539, as amended, like the General Allotment Act considered in *Capoeman*, reveals several indicia of tax immunity of Osage trust property.[10] The basic Act provided that, at the termination of the trust period, the trust properties "shall be the absolute property of the individual members of the Osage tribe . . . or their heirs." 34 Stat. 544. The 1912 [11] and 1947 amendments to the statute (37 Stat.

[10] The United States concedes that the Osage Allotment Act is essentially indistinguishable from the General Allotment Act for tax purposes and that it provides the same immunity against federal taxation. Brief of United States, p. 17. See also *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F. 2d 765 (1962).

[11] The 1912 amendment contained a proviso that nothing therein should be construed to exempt the property from tax. The legis-

86, 88; 61 Stat. 747) provided that the Osage trust properties would not be subject "to lien, attachment, or forced sale . . . prior to the issuance of a certificate of competency." 61 Stat. 747. The 1929 and 1938 amendments (45 Stat. 1478-79, 52 Stat. 1034, 1035) directed that the restricted mineral lands "and all royalties and bonuses arising therefrom shall belong to the Osage Tribe of Indians and shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law. . . ." [12]

These specific provisions, coupled with the elaborate trusteeship system created by the Osage Allotment Act, clearly support the concession of the United States and the holdings of the Court of Claims that the *Capoeman* rationale is fully applicable to Osage trust properties. The Act and its amendments clearly reflect a continuing commitment to protect and preserve the trust property,[13] for eventual distribution to the Osages.

Effectuation of the congressional purpose and fulfillment of the government's solemn commitment to its Osage wards, evidenced by the Osage Allotment Act, can only be realized by a finding that the Osage Allotment

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lative history of the 1912 amendment is quoted in *United States* v. *Mullendore*, 35 F. 2d 78, 82 (8th Cir. 1929) and it shows that the proviso referred solely to the *ad valorem* taxation of the surplus lands which had been authorized by Section 2(7) of the basic statute (34 Stat. 542).

The 1938 amendment also referred to the Secretary paying the Indians' taxes, but again, the legislative history shows that the taxes contemplated were only those on surplus lands. 83 Cong. Rec. 8833 (1938); S. Rep. No. 1798, 75th Cong., 3d Sess. 2 (1938); Hearings on H.R. 8701 Before House Subcommittee on Indian Affairs, May 19, 1938, at 20.

[12] See *Big Eagle* v. *United States*, 156 Ct. Cl. at 677, 300 F. 2d at 771.

[13] The repeated extensions of the trust period further evidence the Congressional concern in this regard. The most recent amendment extends indefinitely the trust over the mineral estate. 78 Stat. 1008.

Act, which contains substantially similar commitments as the General Allotment Act, immunized the trust properties of restricted Osage Indians from Oklahoma death taxes. As pointed out by the Court of Claims below, imposition of state death taxes on these trust properties by Oklahoma, with their possible successive and cumulative impact, poses a real threat that the tribal patrimony of the Osages—which is what these trust properties constitute—will be considerably diminished at the end of the trust period. The *Capoeman* decision commands that this not be allowed to happen.

Nor can the policies of the Osage Allotment Act and the government's solemn obligation to preserve the trust property be frustrated by reference to technical niceties of tax law concerning what incident of ownership is involved in the imposition of a death tax. The *Capoeman* decision instructs that the commitment to maintain and preserve the trust property intact extends to the usufruct of the trust property as well. It follows, *a fortiori*, that that promise provides a tax immunity from state death taxation, which is assessed against both trust corpus and income.

The government argues (Govt. Br., p. 15) that even if the basic property is tax exempt in the hands of the Indian owner, nevertheless this does not mean there cannot be a tax on the transfer of the property. This was also the main theme of the single dissent below.

It is clear from the Osage Allotment Act that the federal supervision and protection of this trust property is to continue until the original owner is declared competent, or until he dies, at which time the trust will terminate as to whatever a competent heir inherits, and will continue as to whatever a noncompetent heir inherits, until that heir is declared competent. Heirs of less than half blood are treated the same as a competent heir. The General Allotment Act provides that the United States will hold the allotment in trust—

> ". . . for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs. . . ." 25 U.S.C. § 348.

The Osage Allotment Act has similar provisions.[14]

Therefore, the words of *Capoeman*—

> "Unless the proceeds of the timber sale are preserved for [the Indian], he cannot go forward when declared competent with the necessary chance of economic survival in competition with others." 351 U.S. at 10.

apply as much to the noncompetent heirs of an allottee as to the noncompetent allottee himself.

The government concedes that the transfer of these Osage properties is not subject to the federal estate tax, and therefore it does not lie for it to suggest that the transfer may be subject to state estate taxes.

Oklahoma raises the issue, for the first time here, that, assuming the heirs of Rose Mason were not restricted Osages, immunity of the trust property of Rose Mason from Oklahoma death taxation would not be required.[15]

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[14] For example, "When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed", 37 Stat. 87; homestead allotments shall remain tax exempt while title remains in the original allottee "and in his unallotted heirs or devicees of one-half or more of Osage Indian blood . . .", 45 Stat. 1479; "The restrictions concerning lands and funds of allotted Osage Indians . . . shall apply to unallotted Osage Indians born since July 1, 1907 . . . and to their heirs of Osage Indian blood . . .", 45 Stat. 1481; all properties held in trust by or under the supervision of the United States "for the Osage Tribe of Indians, the members thereof, or their heirs and assigns", shall so continue until Jan. 1, 1984, 52 Stat. 1035.

[15] In fact, all of the heirs of Rose Mason were and are uncertificated, non-competent Osage Indians subject to the trust supervision of the United States and, had that issue been raised below, an appropriate showing to that effect would have been made of record.

This argument ignores the thrust of the provisions and policy of the Osage Allotment Act that the trust property will be preserved intact until the property is distributed in fee to the Osage allottee or to his heirs or assigns. The statutory command and the tax implications thereof are clear—the trust property shall not be diminished in any manner until the government's responsibility with respect thereto has ended and that cannot occur until termination of the trust. Thus, the status of an heir of a deceased restricted Osage Indian has no bearing on whether the trust property of that restricted Osage Indian is immune from state death taxation.

*Squire* v. *Capoeman* announced a fundamentally different approach to the issue of Indian taxation than that utilized in *West* and *Oklahoma Tax Comm'n*. By discarding and rejecting the basic decisional premises relied upon in *West*, the decision in *Capoeman* effectively modified *West* as a viable precedent, at least on the question of whether Osage trust properties are subject to direct taxes. As noted by the Court of Claims, this has been the uniform interpretation of the effect of *Capoeman* by the lower federal courts and by the United States. (See Pet. App., pp. A-10-12, A-19).[16]

Still another ground presents itself as a basis for expressly modifying *West*. While both *West* and *Oklahoma Tax Comm'n* had held that trust properties which were free from direct taxation were likewise free from death taxation, both decisions were premised on the understanding that Indian trust property was subject to direct taxation. That understanding is no longer valid. The impact of this Court's decision in *Squire* v. *Capoeman* has established that Indian trust property of the kind involved here is immune from both federal income

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[16] This and subsequent references to "Pet. App." are to the Appendix to the Petition for Certiorari filed by the State of Oklahoma.

taxation and federal estate taxation. (Pet. App. A-12) Thus, even applying the *West* holding, it can be found that Osage trust properties are immune from Oklahoma death taxation since, as a result of the *Squire* v. *Capoeman* decision, they are free from direct taxation.

In all, it must be concluded that *Squire* v. *Capoeman*, and not *West* or *Oklahoma Tax Comm'n*, was the controlling precedent and that the Court of Claims was correct in observing that the later decision effectively modified *West*. The time has come to *expressly* modify *West* and respondents respectfully submit that the Court should do so.

## II. THE UNITED STATES BREACHED ITS FIDUCIARY DUTY.

As a preliminary matter, it is both disappointing and distressing to note the conclusion of the United States in its brief, at pages 13-15, that it cannot see its way clear to advocate the obvious interests of its Osage wards on the basic issue of the continued imposition of Oklahoma death taxes on Osage trust properties. It is particularly distressing to read that one of the reasons asserted for this unbecoming reluctance is that an overruling of *West* "might well have an adverse impact on the revenue interests of the United States. . . ." (Brief of United States, pp. 13-14). This stance would hardly seem to comport with the duty of undivided loyalty which the law demands of a trustee. It may also be relevant as to why the United States *never* took any action to contest imposition of Oklahoma death taxes on the trust property of Rose Mason or to seek a refund of such taxes, though failure to take this step seems inexplicably inconsistent with its concession that *federal* taxes do not lie.

The Court of Claims concluded that, on the basis of the facts in the instant case, the United States had

breached its fiduciary duty to its deceased Osage ward, Rose Mason, by failing to either contest Oklahoma's imposition of death taxes on its ward's trust property *or* to seek a refund of such taxes. The facts in the instant case amply support this conclusion.

There is no question that the fiduciary duty owed by the United States to its Indian wards is of the highest order. It is also clear that, in furtherance of that duty, the United States has the obligation and the power to protect its Indian wards and to preserve their rights and immunities. See, *e.g.*, *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715-17 (1943); *Mott* v. *United States*, 283 U.S. 747, 750 (1931). This obligation has been specifically recognized with respect to the Osages and to suits by the United States to recover state taxes unlawfully imposed on Osage property. See *United States* v. *Board of County Comm'rs of Osage County*, 251 U.S. 128 (1913), *cf.*, *Mashunkashey* v. *United States*, 131 F.2d 288, 291 (10th Cir. 1942), *cert. denied*, 318 U.S. 764 (1943).[17]

The trust responsibilities of the United States require it to take affirmative action, in appropriate circumstances, to protect the trust properties of its Osage wards. Generally applicable trust principles commanded the United States to do what was reasonable under the circumstances, always bearing in mind the nature of the fiduciary duty owed. Breach of that duty by the United States in the instant case is bottomed on its failure to act affirmatively to contest imposition of Oklahoma death taxes when fully on notice of the dramatically altered judicial climate on the issue of Indian taxation, and par-

[17] See also *United States* v. *Dewey County*, 14 F.2d 784 (D.S.D. 1926), *aff'd*, 26 F. 2d 434 (8th Cir.), *cert. denied*, 278 U.S. 649 (1928); *United States* v. *Nez Perce County*, 16 F. Supp. 267, 268 (D. Idaho 1936), *aff'd*, 95 F. 2d 232 (9th Cir. 1938); *cf.*, *Town of Okemah* v. *United States*, 140 F. 2d 963, 974 (10th Cir. 1944); *United States* v. *Charles*, 23 F. Supp. 346, 348 (W.D.N.Y. 1936).

ticularly estate taxation, and on certain administrative action of the United States completely at odds with a continued reliance on *West* v. *Oklahoma Tax Comm'n* as a viable and controlling precedent.

1. *Judicial Decisions.* The opinion of the Court of Claims sets forth the decisions of this Court and the lower federal courts which served as ample notice to the United States that the viability of *West* was so much in doubt that, at the very least, there was a duty to seek a ruling. (See Pet. App. 9-11.) The United States was of course aware of the broad implications of this Court's decision in *Squire* v. *Capoeman*, a decision which it candidly concedes presented a different decisional approach than that of *West*, one which contained "broad and important language concerning implied tax immunities on restricted or trust property", and one which the United States has interpreted "generously." (See Brief for United States, pp. 5, 10, 11.)

Special note should also be taken of the fact that three of the lower federal court decisions had involved the issue of the imposition of death taxes on the restricted or trust properties of Indians. One Court of Appeals decision had held that the *Capoeman* rationale required a finding that the California inheritance tax could not be imposed on Indian trust property.[18] Two federal district court decisions had held that the federal estate tax could not be imposed on Indian trust property.[19] Additionally, the United States was on notice that a suit had been filed in August 1967 to recover federal estate taxes imposed on the trust property of a deceased restricted Osage Indian.[20] Recovery in that suit was premised on

[18] *Kirkwood* v. *Arenas*, 243 F. 2d 863 (9th Cir. 1957).

[19] *Nash* v. *Wiseman*, 227 F. Supp. 552 (W.D. Okl. 1963); *Asenap* v. *United States*, 283 F. Supp. 566 (W.D. Okl. 1968).

[20] *Beartrack* v. *United States*, Ct. Cl. No. 281-67.

the concept that the *Capoeman* rationale immunized Osage trust properties from estate taxation. The Justice Department, presumably with the concurrence of the Internal Revenue Service, settled that case by tendering a full refund of the estate tax imposed. All this action was taken prior to full payment of the Oklahoma estate taxes imposed on the estate of Rose Mason.

In view of these circumstances, there was a duty on the part of the United States to challenge the imposition of Oklahoma death taxes on Osage trust property and to seek a definitive ruling on *West*, if necessary. That duty is not met by asserting that the amount involved was "small" [21] or that the wards themselves could bring suit, or that litigation would have to be undertaken. These assertions ignore the serious and continuing responsibility the United States owes to its Osage wards and it likewise ignores the obvious fact that a successful challenge of West would have redounded to the benefit of *all* restricted Osage Indians, and not simply the estate of Rose Mason.

2. *Administrative Action.* Note has already been taken that the government's confession of error in the *Beartrack* case which occurred prior to final payment of the Oklahoma estate taxes in the instant case. Additionally, some four months after these taxes had been paid, the Internal Revenue Service issued Rev. Rul. 69-164, 1969—1 Cum. Bull. 220, which, applying the *Squire* v. *Capoeman* rationale to the issue of federal estate taxation of Indian trust or restricted properties under the General Allotment Act, held that such properties were

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[21] The amount of recovery in the instant case is approximately $7,000. While the United States may view this as "small" (Brief of United States p. 13), it is of substantial consequence to those whose trust properties were depleted as a result of the imposition of the Oklahoma estate tax.

immune from federal estate taxation.[22] Four months later, on August 15, 1969, a Technical Advice Memorandum was issued by the Internal Revenue Service stating that the Ruling and the *Capoeman* rationale were fully applicable to Osage trust properties. Notwithstanding these facts and actions of the United States, which were clearly inconsistent with a continued reliance on the precedential value of *West*, the United States never took any action to seek a refund of the Oklahoma estate taxes imposed against the estate of Rose Mason. Nor did the government at any time challenge the imposition of Oklahoma estate taxes on the trust properties of any other restricted Osage Indians. The instant suit was not filed by respondents until December, 1970, over two years after the United States had confessed error in the *Beartrack* case, twenty months after issuance of Rev. Rul. 69-164, and sixteen months after issuance of the Technical Advice Memorandum. In that span of time, the United States did nothing.

The factual record of this case shows that there was abundant notice to the United States that *West* could no longer be relied on and that judicial developments clearly called for a challenge of the imposition of Oklahoma death taxes on Osage trust property. Further, its own administrative action, namely, confession of error in *Beartrack* and issuance of Rev. Rul. 69-164 and the aforestated Technical Advice Memorandum, was completely inconsistent with a continued reliance on *West*. Under these circumstances, it was a breach of the fiduciary duty owed by the United States to fail to take any action with respect to the imposition of Oklahoma estate taxes on the estate of Rose Mason and the Court of Claims properly found that the United States should be held liable.

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[22] The Court of Claims noted the United States' concession that this Ruling "had the appearance of being contrary to the decision of the Supreme Court in *West*" (Pet. App. A-22, n. 16.)

The Court of Claims found liability on its finding that the United States should have affirmatively acted to contest the imposition of Oklahoma estate taxes on the estate of Rose Mason. The court did not reach our alternative theory of the case that, regardless of questions of negligence or failure to act, the United States breached its fiduciary duty by paying these taxes. The Osage Allotment Act commands the United States to preserve the trust properties of its Osage wards without diminution. The payment of estate taxes to Oklahoma by the United States was a breach of that duty for which it is accountable without regard to questions of negligence.

## III. ISSUES NOT RAISED OR DEVELOPED BELOW SHOULD NOT BE CONSIDERED BY THE COURT.

Petitioners, particularly the State of Oklahoma, raise several issues in their briefs which were either not considered in the proceedings below or not raised by the facts in the instant case. In accordance with established rules of judicial procedure, these matters should not be first considered here.

1. *Retroactivity.* The State of Oklahoma argues that, should this Court affirm, the *Mason* decision not be given retroactive effect.

In the first place, retroactivity is not involved in this case. The taxes here were paid in 1968 and 1969, and if a refund is ordered, it will not raise an issue of retroactivity. Oklahoma is really concerned about other cases which are pending. The issue should be reserved until those cases are tried.

In the second place, in its limited participation in the proceedings below, Oklahoma at no time raised this issue nor did it ever introduce into the record any evidence relevant to that issue. The question of retroactivity was not litigated and there was no ventilation or exploration

below of the factors relevant to a determination of that question.

2. *Time of Breach.* Oklahoma also asks this Court to determine an issue which was not raised by this case, but one which may be raised in other pending cases. It asks that the Court make a finding as to when the United States may be said to have breached its fiduciary duty to *other* Osage Indians by not challenging the *West* case. It is incredible that the Court would be asked to decide, without any factual record, questions which are relevant only to parties not before the Court. Respondents respectfully suggest that the Court summarily decline to entertain this question.

Like the retroactivity issue, Oklahoma will have full opportunity to litigate this issue in the pending suits, where it is relevant, should it wish to do so.

3. *Recovery of Interest.* Oklahoma raises, for the first time here, the issue of whether it may be required to pay interest on the tax refund due the respondents. Oklahoma did not present this issue for the consideration of the Court of Claims and it is too late to raise it now. Again, should Oklahoma wish to litigate this issue, it will have ample opportunity to do so in the pending suits.[23]

4. *Reinvested Property.* The United States asks the Court to consider whether the exemption from Oklahoma death taxes found by the lower court should apply to "reinvested property". (Brief of United States, p. 18.) This question was not litigated below and is being raised here for the first time. There is no record evidence concerning whether any "reinvested property" is involved in this case, nor has there been any opportunity to litigate this question. (It is our understanding that none of the

[23] It should be noted that Oklahoma law provides for the payment of 3% interest on refunds of Oklahoma taxes. 68 Okl. Stat. § 225(c).

trust property involved herein is "reinvestment" property, *i.e.*, accumulated income arising from investment of the basic trust properties, or property purchased with such income.) Accordingly, this question, if it does exist, is not properly before the Court.

As is the case with Oklahoma, the United States will have opportunity to litigate this issue if it wishes, in the pending litigation.

## IV. OKLAHOMA LACKS JURISDICTION TO TAX OSAGE TRUST PROPERTY.

We asserted below that Oklahoma was without jurisdiction to tax Osage trust property. The Court of Claims did not rule on this point but this Court's recent decision in *McClanahan* v. *Arizona State Tax Comm'n*, decided March 27, 1973, requires us to reassert this point.

Any remaining doubt as to the Osage Indians' liability for Oklahoma estate tax is dispelled by this Court's decision in *McClanahan*, which holds that the State of Arizona lacks jurisdiction to collect state income taxes from earnings of a Navajo Indian on the Navajo Indian Reservation.

We have previously shown that under modern authority the Osage Allotment Act granted the Osages immunity from federal *and* state estate taxes. But aside from this specific tax immunity, the estate tax levy involved in the instant suit must fall under the familiar principle, reaffirmed and clarified in *McClanahan*, that a state generally lacks jurisdiction to tax members of a tribe with respect to transactions occurring or property located on the tribe's reservation.

In *McClanahan*, the Court broadly held that the State of Arizona had no jurisdiction to impose the income tax in question. Starting with the proposition that American Indian tribes are, for some purposes, still to be

regarded as independent sovereignties, the Court noted that the question of the power of the state to impose the tax had to be resolved through analysis of the relevant treaties and statutes "with this tradition of [tribal] sovereignty in mind." Slip Op. at 9-10. The Court then ruled that under the provisions of the Navajo Treaty of 1868, "the reservation of certain lands for the exclusive use and occupancy of the Navajo and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision." *Id.* at 11. Turning then to the Enabling Act under which Arizona entered the Union, the Court pointed out that the Act, by implication, recognized the tax immunity of the tribes within the state and, specifically, precluded the state from assuming jurisdiction over Indians residing on the Navajo Reservation. *Id.* at 11-12. Based on the foregoing and other relevant statutory indicia, the Court held that the imposition of tax would constitute an impermissible interference by the state "with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves." *Id.* at 2.

Application of the test announced in *McClanahan* leads to a conclusion that Oklahoma is without jurisdiction to impose its estate tax on Osage trust properties. These trust properties consist of the tribal mineral estate, the cash proceeds therefrom, and the cash proceeds from the sale of the ancestral Osage lands in Kansas. Even more so than the income in *McClanahan*, these properties are imbued with a tribal nature.

A review of the relevant federal and state enactments confirms that, much like the situation in *McClanahan*, there is ample statutory indicia of the lack of state tax jurisdiction over Osage trust properties. The Osage Reservation was established prior to the time Oklahoma was admitted into the Union. The Act establishing the

Reservation, 17 Stat. 228 (1872), directed that certain lands be "set apart for and confirmed as their reservation" for the Osages and that the purpose of the Act was to provide the Osages "with a reservation". 17 Stat. 229. At that time, the Osages had as much sovereignty over their Reservation as the Navajos had over theirs.

Similarly, as in *McClanahan*, the Enabling Act which governed the admission of Oklahoma into the Union broadly disclaimed jurisdiction over Indians and Indian territory[24] and, as in *McClanahan*, Congress never granted Oklahoma jurisdiction to impose the tax in question.

No federal statute has been found expressly ceding jurisdiction over the Osage Reservation to Oklahoma. The Enabling Act provided for the creation of "Osage County", with the same boundaries as the Osage Indian Reservation (34 Stat. 277) and this has led the state to exercise some measure of jurisdiction within the boundaries of the County-Reservation.[25] However, the creation

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[24] The Oklahoma Enabling Act provides, in pertinent part (34 Stat. 270):

> That the people inhabiting said proposed State so agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

This disclaimer was carried forward as Article I, Section 3 of the Oklahoma Constitution.

[25] This obviously gave the state jurisdiction over non-Indians on the Reservation, but we do not concede that the state has any jurisdiction over Osage Indians in Osage County. However, the Court need not here decide the question of the full ambit of state sovereignty over the reservation. The only question here is whether the State of Oklahoma ever obtained jurisdiction over the minerals of the Osage Reservation and as we show (*infra*, p. 23) Congress clearly has evinced an intent to guard the Indian status of

of Osage County did not, by and of itself, disestablish the Osage Indian Reservation or end the status of reservation Indian lands as Indian country, *United States* v. *Ramsey*, 271 U.S. 467 (1926).

Of course, once Congress establishes an Indian reservation, its status remains unchanged until Congress decrees otherwise. *United States* v. *Celestine*, 215 U.S. 278, 285 (1909); *Seymour* v. *Superintendent*, 366 U.S. 351, 359 (1962); *New Town* v. *United States*, 454 F.2d 121 (8th Cir. 1972). In the case of the Osage Reservation, Congress has not only refrained from disestablishing the reservation but has taken strong, affirmative steps to preserve the tribal status of the tribe's mineral estate.

The pattern of the Osage Allotment Act and the several amendments thereto has been to maintain the mineral estate underlying the Osage Reservation as *tribal* property.[26] With the exception of a federal statute *permitting* Oklahoma to levy a gross production tax on mineral production on the Osage Reservation, the United States has never permitted Oklahoma to exercise any control or sovereignty over this tribal property.

The federal statutory scheme relating to the mineral reservation also continued the role of the tribal government in the management and control of this part of the Reservation. For example, the Osage Council jointly participates in the making of mineral leases (34 Stat. 543); it approves exchanges of surplus lands among alottees (37 Stat. 86); it determines the bonus value of any tract offered for mineral leasing (61 Stat. 459, 460); it determines the royalties to be paid to the Osage Tribe

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the Osage mineral estate and keep it free from the burdens of state control and taxation.

[26] In fact, the most recent amendment, extending indefinitely the trusteeship over the mineral estate, refers to that estate as the "Osage mineral *reservation*". 78 Stat. 1008.

under any mineral lease (64 Stat. 215).[27] The State of Oklahoma, we are advised, does not attempt to exercise its usual mineral regulation powers over the Osage mineral reservation, except for the permitted gross production tax.

A further indication of continued Osage tribal sovereignty is that, unlike other Indian tribes in Oklahoma, the United States continues to recognize the reservation status of the Osage Reservation [28] and Indian self-government continues to exist in the Indian villages specifically provided for in the Osage Allotment Act (34 Stat. 542). See 25 C.F.R. Part 74. We are advised that Oklahoma does not attempt to assert its usual police powers within these villages.

While, admittedly, the Osage Reservation today would not appear to possess all the attributes of sovereignty of the Navajo Reservation, nonetheless, it is clear that the Reservation has not been fully terminated and that a residuum of sovereignty remains with the Osage Tribe. This is certainly so with respect to the "Osage mineral reservation."

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[27] This was a power which had originally been vested in the President. See 34 Stat. 343.

[28] Bureau of Indian Affairs maps show the Osage Reservation as the only Indian reservation left in Oklahoma. According to these maps, all the other reservations have been terminated.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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R. D. MAHAN

April 9, 1973

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-654

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UNITED STATES OF AMERICA, *Petitioner*

v.

ARCHIE L. MASON, ET AL., *Respondents.*

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## BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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## BRIEF OF NATIVE AMERICAN RIGHTS FUND AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The Native American Rights Fund files the following brief *amicus curiae* with the consent of petitioners United States and State of Oklahoma and respondents Archie L. Mason et al. Written consents of all parties, by letter, are on file with the Clerk of this Court.

### INTEREST OF AMICUS CURIAE

The Native American Rights Fund [hereinafter the Fund] is a private, non-profit corporation organized for the purpose of protecting the rights and enhancing

the general welfare of American Indians and providing legal representation and counsel to Indians in cases of major significance. The Fund appears and submits this brief *amicus curiae* because of its general interest in the subject of state taxation of Indians and Indian property, and in the enforcement of the federal trust responsibility toward Indians. The Fund has several Indian tribal and individual clients in cases which concern the validity of several forms of state taxation within Indian Country, and in cases which concern the fiduciary duties of executive officials of the United States to Indian tribes and individuals.

Since this case will establish an important precedent as regards the power of states to tax Indian allottees, and with respect to the fiduciary duties of federal executive officials affirmatively to protect Indian property, the Native American Rights Fund files this brief in support of the decision of the Court of Claims and the position of the respondents.

## ARGUMENT

The Native American Rights Fund as *amicus curiae* believes that the Court of Claims correctly held that the United States violated its fiduciary duties as trustee by its failure to commence litigation to challenge the continued validity of *West* v. *Oklahoma Tax Commission*, 334 U.S. 717 (1948). As the decision of the Court of Claims so carefully shows, the authority of *West* had been sufficiently eroded by the late 1960s that a reasonable and prudent trustee should have commenced such litigation.

The decision of the court below and the brief of the respondents deal comprehensively with the cases

and executive actions subsequent to *West* which called the validity of that decision into question, and with the issue of whether this Court should now overrule *West*. The Fund will take a somewhat more historical approach, concentrating upon the federal trust responsibility. First, we will discuss the nature and scope of the federal trust responsibility to Indians, including the Osage allottees, on which the liability of the United States to the respondents is based. Secondly, we will show how the basic principles of this historic trust responsibility have been observed in almost every case decided by this Court involving state taxation of Indians, save for *West* and its predecessor, *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943). The trust responsibility, and its corollary that ambiguous congressional enactments should be construed to provide maximum protection to Indian property, constitutes a sufficient basis for immunity of Indian allotments from state taxation—apart from and independent of the "instrumentality" doctrine laid to rest by *West* and its predecessor case. These principles as well formed the basis for this Court's subsequent decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956). Given this history, and the principle established by decisions of this Court that the executive departments of the United States must observe at least the obligations of an ordinary trustee toward Indian allottees, the Fund submits that the United States was obligated to bring suit challenging the continued validity of the specific holding in *West* (although not the rejection by *West* of the "instrumentality" doctrine). The United States was thus properly held liable for its failure to commence litigation. And since the Fund concludes that the holding in *West* (although not its reasoning concerning taxation of "instrumentalities") should be

overruled, we submit that the United States was also properly held liable for the full amount of the tax paid to the state.

### I. NATURE AND SCOPE OF THE FEDERAL TRUST RESPONSIBILITY

The trust responsibility has been recognized and applied in more than a score of decisions by this Court,[1] beginning with Chief Justice Marshall's *Cherokee Nation* v. *Georgia*,[2] 30 U.S. (5 Pet.) 1 (1831), and continuing to the present day. While this trust responsibility

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[1] *E.g.*, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet) 1 (1831); *Fellows* v. *Blacksmith*, 60 U.S. (19 How) 366 (1857); *United States* v. *Kagama*, 118 U.S. 375 (1886); *Choctaw Nation* v. *United States*, 119 U.S. 1, 28 (1886); *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 295 (1890); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 305 (1902); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564 (1903); *Tiger* v. *Western Investment Co.*, 221 U.S. 286 (1911); *Heckman* v. *United States*, 224 U.S. 413 (1912); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *United States* v. *Sandoval*, 231 U.S. 28, 45-46 (1913); *United States* v. *Pelican*, 232 U.S. 442 (1914); *Perrin* v. *United States*, 232 U.S. 478 (1914); *United States* v. *Nice*, 241 U.S. 591 (1916); *Cramer* v. *United States*, 261 U.S. 219 (1923); *United States* v. *Payne*, 264 U.S. 446, 448 (1924); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941); *Tulee* v. *State of Washington*, 315 U.S. 681 (1942); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-97 (1942); *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946).

[2] *Cherokee Nation* was an action filed in this Court by the tribe to enjoin enforcement of Georgia statutes comprehensively regulating activities on the Cheorkee reservation in that state. Chief Justice Marshall, speaking for the Court, held that the tribe was not a "state" as the term is used in Article III, Section 2 of the Constitution: hence the Court did not have original jurisdiction over the case. Explaining his holding, Marshall characterized the juridical relationship of Indian tribes to the United States as "perhaps unlike that of any other two people in existence." 30 U.S. (5

has been used in various contexts, and its exact attributes may vary depending upon particular treaties and statutes pertaining to individual tribes, certain principles of general application emerge from the decisions of this Court.

The first principle pertains to the construction of legislative enactments. Although Congress possesses a "plenary" power[3] to manage Indian property—a

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Pet.) at 16. While conceding that Indian tribes do possess some attributes of national sovereignty, and of "statehood," the Court held them to be "domestic dependent nations." In large measure, the Chief Justice based his analysis upon the observation that Indian tribes were dependent upon the United States for protection rather than existing as independent sovereignties. "Their relation to the United States," he concluded, "resembles that of a ward to his guardian." *Id.* at 17.

[3] This "plenary" power was held by this Court itself to derive from the trust responsibility of Congress to the Indians. For example, in *United States* v. *Kagama*, 118 U.S. 375 (1886), this Court sustained the validity of a federal criminal code applying to Indian reservations by relying upon the trust responsibility as a basis for congressional power. The Court first concluded that Article I, Section 3, clause 8—which confers explicitly upon Congress the "power to regulate Commerce with the Indian Tribes"—did not authorize enactment of the criminal code. But the Court sustained the constitutionality of the legislation by relying on the government's fiduciary relationship to the Indians. It held that "these Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection and with it the power." 118 U.S. *supra* at 383-384 (emphasis in original) *See also Sunderland* v. *United States*, 266 U.S. 266, 233-234 (1924); *Brader* v. *James*, 246 U.S. 88, 96 (1918); *Tiger* v. *Western Investment Co.*, 221 U.S. 286 (1911); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 305 (1902); *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 295 (1890).

More recent decisions of this Court have concentrated upon the trust responsibility as a limitation on the power of Congress and executive officials. *E.g.*, *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); *United States* v. *Creek Nation*, 295 U.S. 103 (1935).

power which may even extend to the abrogation of treaty rights, e.g., *Lone Wolf* v. *Hitchock*, 187 U.S. 553 (1903)—the courts will presume that Congress has acted in good faith and intends protection of Indian property unless a contrary intent unmistakably appears. Consequently, statutes will not ordinarily be construed to authorize a taking of Indian property rights by implication. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 353-354 (1941); *United States* v. *Payne*, 264 U.S. 446, 448 (1924). Similarly, statutes which are ambiguous in their language are to be construed to provide the fullest protection of Indian property rights. This last principle has been applied several times by this Court in cases involving state and federal taxation of individual Indian allotments, the most recent of which is *Squire* v. *Capoeman*, 351 U.S. 1 (1956). In *Choate* v. *Trapp*, 224 U.S. 665 (1912), this Court considered whether a statutory exemption of allotted reservation lands from state taxation had been repealed by implication by a second statute which removed certain restrictions on alienation imposed by the first statute. The state officials who were parties to the case relied upon the general principle that tax exemptions should be narrowly construed. After conceding the general applicability of that doctrine, the Court held that:

> "But in the government's dealings with the Indians, the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people who are wards of the nation . . ." 224 U.S. *supra* at 675.

This Court followed the *Choate* principle in *Carpenter* v. *Shaw,* 280 U.S. 363, 366-367 (1930) and in *Squire* v. *Capoeman,* 351 U.S. *supra* at 6-7. See also *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 87-88 (1918); *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968). Since the Osage allotments and mineral headrights are held by the United States in trust for the Indians, and are administered by the United States, there can be no question that the trust responsibility pertains to them.

A second principle established in decisions by this Court is that the federal trust responsibility strictly limits executive authority and discretion to administer Indian property and affairs. A leading case is *United States* v. *Creek Nation,* 295 U.S. 103 (1935), where this Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. This Court bottomed its decision on the federal trust doctrine:

> "The tribe was a dependent Indian community under the guardianship of the United States and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to *limitations inhering in such a guardianship* and to pertinent constitutional restrictions." 295 U.S. *supra* at 109-110 (emphasis supplied).

*Creek Nation* stands for the proposition that—unless Congress has expressly directed otherwise—the federal

executive is held to a strict standard of compliance with fiduciary duties. The executive must exercise due care in its administration of the property; it may not "give the tribal lands to others, or . . . appropriate them to its own purposes." 295 U.S. *supra* at 110.[4] Decisions of this Court reviewing the lawfulness of administrative conduct managing Indian property have held officials of the United States to "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." *Seminole Nation* v. *United States,* 316 U.S. 286, 296-297 (1942); *United States* v. *Payne,* 264 U.S. 446, 448 (1924). Decisions of the Court of Claims have uniformly held that *at least* the ordinary standards of a private fiduciary must be adhered to by executive officials administering Indian property. *E.g., Menominee Tribe* v. *United States,* 101 Ct. Cls. 10, 18-19 (1944); *Navajo Tribe* v. *United States,* 364 F. 2d 320, 322-324 (Ct. Cls. 1966).

## II. PERTINENT PRINCIPLES DERIVED FROM THE FEDERAL TRUST RESPONSIBILITY CONSTITUTE THE BASIS FOR IMMUNITY OF INDIAN ALLOTTEES FROM STATE TAXATION

### A. The Law Prior to West

Prior to *West* v. *Oklahoma Tax Commission,* 334 U.S. 717 (1948) and its predecessor *Oklahoma Tax Commission* v. *United States,* 319 U.S. 598 (1943), Indian allotments and the income therefrom were al-

[4] *Creek Nation* concerns the obvious prohibition against appropriating trust assets by the trustee. This duty stems directly from the duty of loyalty, which Professor Scott has called "the most fundamental duty owed by the trustee to the beneficiaries." *A. Scott, Law of Trusts,* p. 1297 (3d Ed., 1967).

most uniformly considered exempt from state taxation.[5] See generally, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, (1942), pp. 254-265.[6] This Court prior to 1943 had held allotments and other trust property immune from state property taxation, *e.g., United States* v. *Rickert,* 188 U.S. 432 (1903), and from state inheritance taxes, *Childers* v. *Beaver,* 270 U.S. 555 (1926). Lower federal courts had generally anticipated and followed these rulings,[7] and had also held that proceeds from the sale or lease of allotted lands are exempt from state income taxation.[8] This immunity was based to some extent upon the notion that allotments were an "instrumentality" of the federal government. *United States* v. *Rickert,* 188 U.S. 432, 438-439 (1903). But

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[5] A somewhat different question is presented where the state seeks to tax non-Indian lessees of allotments in connection with their business activities there. *Oklahoma Tax Commission* v. *Texas Co.,* 336 U.S. 342 (1949); *Thomas* v. *Gay,* 169 U.S. 264 (1898); *Agua Caliente Band* v. *County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972); See generally *McClanahan* v. *Arizona Tax Commission,* —— U.S. ——, (No. 71-834 decided March 27, 1973).

[6] Mr. Cohen has been recognized by this Court as "an acknowledged expert in Indian law." *Squire* v. *Capoeman,* 351 U.S. 1, 8-9 (1956). In that decision, the Court also noted that "Mr. Cohen was Chairman of the Department of the Interior Board of Appeals and Assistant Solicitor of the Department. The Handbook has a foreword by Harold L. Ickes, then Secretary of the Interior, and was printed by the United States Printing Office." 351 U.S. at 9, n. 15.

[7] *E.g., Board of Com'rs* v. *United States,* 100 F.2d 929 (10th Cir.), *mod. on other grounds* 308 U.S. 343 (1939); *United States* v. *Glacier County,* 99 F.2d 733 (9th Cir. 1938); *United States* v. *Benewah County,* 290 Fed. 628 (9th Cir. 1923); *Morrow* v. *United States,* 243 Fed. 854 (8th Cir. 1917).

[8] *United States* v. *Thurston County,* 143 Fed. 287 (8th Cir. 1902)

an independent ground for the tax exemption was the national policy embodied in the trust responsibility that the United States had a duty to protect and care for the Indians. This was expressed in *Rickert* as follows:

> "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands [as] . . . part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life. . . ." 188 U.S. at 437.

In similar fashion, in *Choate* v. *Trapp,* 224 U.S. 665 (1912) and *Carpenter* v. *Shaw,* 280 U.S. 363 (1930), the tax immunity was based upon the trust doctrine that silent or ambiguous statutes should be construed favorably to the Indians.

The only deviation, prior to *West,* from the principle that allottees were immune from state taxation was the holding in *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U.S. 575 (1928). That case concerned off-reservation allotments purchased for individual Indians by the United States with restricted funds. While these lands were held in trust for the allottees, they differed from allotments created under the General Allotment Act of 1887 in that they had once been private lands, and had been purchased by the United States pursuant to a later statute. The Court held that since Congress had not expressly exempted these allotments from state property taxation, they "might be subject to that taxation unless Congress speaks." 276 U.S. at 581.[9] But Con-

[9] The Court was evidently concerned that purchases of private, taxable lands for Indians would otherwise too greatly diminish the State's tax base. 276 U.S. at 581-582.

gress responded to the *Shaw* decision by enacting a specific tax exemption for individual homestead allotments purchased out of restricted funds.[10] These statutes manifested congressional adherence to the historic trust relationship toward preserving Indian trust property from state taxation.

**B. The Decisions in Oklahoma Tax Commission and in West**

In *West,* over the dissent of three Justices, this Court held that trust property of Osage allottees was subject to state inheritance taxes. The Court in *West* distinguished *United States* v. *Rickert,* 188 U.S. 432 (1903), as involving direct property taxation, but also questioned the continued vitality of the federal instrumentality doctrine, which it stated to be "the very foundation upon which the *Rickert* case rested . . . " 334 U.S. at 726. The Court held that Congress must "in some affirmative way" manifest an intention that these allotments be exempt from taxation.

*West* was preceded by this Court's decision in *Oklahoma Tax Commission* v. *United States,* 319 U.S. 598 (1943), an action brought by the United States for a refund of state estate taxes assessed and paid on cash and securities and lands of deceased Indian allottees. This property was owned in fee by the Indians but restricted by statute against alienation.[11] In a five-to-

[10] Act of June 20, 1936, 49 Stat. 1542, as amended by Act of May 19, 1937, 50 Stat. 188. This Court sustained the validity of these enactments in *Board of Commissioners* v. *Seber,* 318 U.S. 705, 715 (1943), relying upon "the existence of federal power to regulate and protect the Indians and their property against interference even by a state. . ."

[11] Consequently, the full force of the trusteeship principles may not be pertinent to the facts of that case.

four decision, this Court held that the state might tax the cash and securities, but not the lands. The Court's decision rested partly on the unique legislative history of the enactment imposing the restrictions.[12] The majority opinion did acknowledge that the "statute must be [interpreted] in accord with the generous and protective spirit which the United States properly feels toward its Indian wards,"[13] but declined to read the statute as extending a tax immunity to these allottees. As in *West,* the Court appeared to interpret *Rickert* as resting solely on the intergovernmental "instrumentality" doctrine.[14]

The Fund submits that these two decisions incorrectly perceived the basis for this Court's earlier holding in *Rickert,* and for the general immunity of Indian allottees from state taxation. That immunity in part was premised on the instrumentality doctrine, but it also rested upon the federal trust obligations to the Indians, as this Court recently recognized when it acknowledged the continuing vitality of *Rickert*[15] despite the demise of the instrumentality principle. The analysis of the Court in *West* that the instrumentality doctrine should be constricted survives. But *West* ignored the important federal trust obligations, announced in *Rickert, supra, Choate* v. *Trapp, supra,* and *Carpenter* v. *Shaw, supra,* that doubtful statutory expressions should be construed to protect Indian allottees from state taxation and that state taxation was

[12] 319 U.S. *supra* at 604-607

[13] *Id.* at 607.

[14] *Id.* at 603.

[15] *Mescalero Apache Tribe* v. *Jones,* decided March 27, 1973, slip op., p. 13, 14.

inconsistent with the congressional purpose manifested in the allotment program. An express affirmative indication of tax immunity by Congress is not required.[16]

The historic and well-established principles of the federal trust responsibility articulated in virtually every case prior to *West* were reasserted by this Court in *Squire* v. *Capoeman, supra,* and in every subsequent lower court case to consider state taxation of Indian allottees.[17] For example, the Court in *Squire* held the proceeds from timber sales of allottees exempt from the federal capital gains tax, "although" the statutory provision is not expressly couched in terms of nontaxability." 351 U.S. *supra* at 6. Silence, then, was construed in the Indians' favor, in part because the timber was a depletable resource. The Court observed that "unless the proceeds of the timber sale are preserved for the respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others." *Id.* at 10. Here, too, the subsurface minerals are a depletable resource, the proceeds from which must be preserved if the Osage allottees are to stand on their own feet when the trust period expires in 1984.

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[16] As this Court recently noted in *McClanahan* v. *Arizona State Tax Commission*, decided March 27, 1973, slip op. p. 13: "narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization."

[17] *Kirkwood* v. *Arenas*, 243 F.2d 863 (9th Cir. 1957); *Big Eagle* v. *United States*, 300 F.2d 765 (Ct. Cl. 1962); *United States* v. *Hallam*, 304 F.2d 620 (10th Cir. 1962); *Nash* v. *Wiseman* 227 F. Supp. 552 (W.D. Okla. 1963); *Asenap* v. *United States*, 283 F. Supp. 566 (W.D. Okla. 1968). These cases are fully discussed by the Court of Claims and in the brief of the respondents.

The precise holding in *West*, then, was left as a lonely exception to the mainstream doctrine rearticulated in *Squire* and subsequent cases.[18] After *Squire*, *West* reasonably could be read as rejecting earlier cases (such as *United States* v. *Rickert*, *supra*) only to the extent those cases held allottees to be exempt from state taxation on the ground that Indian allotments were "instrumentalities" of the federal government. Since immunity for trust property of the Osage allottees from state inheritance taxes could be justified on the other principles that formed the basis for *Squire*, the United States as trustee for respondent and other Osage Indians should have brought an action to challenge the continued validity of the holding in *West*.

### III. THE EXECUTIVE DEPARTMENTS OF THE UNITED STATES WERE OBLIGATED BY ORDINARY FIDUCIARY PRINCIPLES TO COMMENCE LITIGATION CHALLENGING THE VALIDITY OF WEST

That its executive departments owe the duty to adhere to the standard of *at least* an "ordinary fiduciary" in the management of Indian property is a proposition we are certain the United States does not dis-

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[18] It is instructive that—prior to the decision below—*West* had been cited only three times by lower federal courts in twenty-five years, and was not even referred to in *Squire*. In each case, moreover, the Indians had been held exempt from taxation. In *Kirkwood* v. *Arenas*, 243 F.2d 863 (9th Cir. 1957) allotments pursuant to Mission Indian Act were held exempt from state income and inheritance taxes; *Squire* was held controlling, and *West* was distinguished as applicable only to the Osage statute. (It is noteworthy that the United States Attorney in *Kirkwood* represented the Indians seeking exemption.) Accord: *Shelton* v. *Lockhart*, 154 F. Supp. 244 (W.D. Mo. 1957); *Arenas* v. *United States*, 140 F. Supp. 606 (S.D. Cal. 1956) (the lower court determination of *Kirkwood*).

pute.[19] However, as Professor Scott observes, where "a particular trustee has greater skill or more facilities than those of the ordinary prudent man, . . . he is under a duty to exercise the skill that he has and to employ the facilities which are available to him.[20] The United States is plainly no "ordinary man." It is particularly surprising in this case that the officials within the Department of the Interior administering this trust property took no steps whatever to use the expansive facilities of the United States government in considering and evaluating their actions—no opinions of the Department's Solicitor or the Attorney General were sought, no efforts to consult with tax experts in the Departments of Justice or the Treasury were made.

The most directly pertinent fiduciary duties in this case are the duties of a trustee to enforce claims of the trust against third persons and to defend claims of third persons against the trust.[21] Of course, the trustee is not obliged to bring all conceivable claims, nor is he held to the strict liability of an insurer. His duty is defined by Professor Scott as follows: "to take *reasonable* steps to realize on claims which he holds in trust.

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[19] The Brief for the United States, pp. 6-13, implicitly assumes that it is bound by this standard. As President Nixon observed in his July 8, 1970 Message to Congress Transmitting Recommendations for Indian Policy:

> "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently, they are also the subject of extensive legal dispute." 116 Cong. Rec. 23, 131 (1970).

[20] A. Scott, Law of Trusts, p. 1410 (3d Ed. 1967)

[21] A. Scott, Law of Trusts, Section 177-178 (3d Ed. 1967).

If he fails *to take such steps as are reasonable,* he is subject to a surcharge for such loss as results from his failure to act."[22] (emphasis supplied) The question, therefore, is whether it was "reasonable under the circumstances"[23] for the United States to pay Oklahoma inheritance taxes in the late 1960s[24] without instituting proceedings to challenge the imposition of the taxes.

The reasonableness of the trustee's inaction must be evaluated against the general fiduciary precept that—while a trustee "has a certain amount of discretion"—"ordinarily he should defend actions . . . which if successful would cause a loss to the trust estate."[25] It is true, as the United States points out (quoting Scott), that the trustee "does not necessarily act unreasonably in paying a claim . . . he believes . . . is not well founded." (Brief for United States, p. 8.) But the

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[22] Id. at 1424.

[23] Id. at 1428.

[24] Since the United States could have petitioned the Oklahoma Tax Commission for a refund within one year after the taxes were paid, Oklahoma Statutes § 68-227 (1970 Supp), the critical date for assessing the "circumstances" as they appeared to the trustee is not the date on which the taxes were paid, but at least one year thereafter. This vitiates the argument of the United States that "in 1967 and 1968, when the United States paid these taxes, a number of the decisions and executive actions relied upon by respondent had not yet occurred." (Brief for the United States, p. 5) By 1969, all these decisions had been made.

Moreover, it is very doubtful that state statutes of limitations apply to actions commenced by the United States on behalf of the Indians. The controlling statute, 28 U.S.C. § 2415(a), (g), suggests that the United States would have until July, 1977, to bring the respondents' claim and the claims of other Osage decedents against the State of Oklahoma.

[25] A. Scott, Law of Trusts, p. 1428 (3d Ed. 1967).

exception pertains only where the debatable tax is imposed "in another state for a small amount" and "it would cost more than the amount of the tax to litigate the question." [26] Such an exception is plainly inapplicable here. The State of Oklahoma has collected "several million dollars" in estate taxes from Osage allottees since 1956. (Brief of State of Oklahoma, p. 21.) The United States is trustee for over 2,000 Osage headrights of very great value. It is inconceivable that—given the state of the law in the middle and late 1960s—a reasonable man faced with a tax liability of over $100,000 per annum *on his own property*[27] would have desisted from filing litigation to challenge the validity of the tax in these circumstances. True, such an action would have in all likelihood required ultimate resolution by this Court, but the question of law was clear-cut and it seems unlikely that the underlying facts would have been in substantial dispute or required lengthy litigation.[28]

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[26] Id., p. 1429 (3d Ed. 1967).

[27] The Fund agrees with the United States that a trustee's duty should be *at least* the measure of "care and skill [which] . . . a man of ordinary prudence would exercise in dealing with his own property." (Brief for the United States, p. 7.) In addition, the United States is held as trustee to exercise the special skills and facilities it possesses on the beneficiaries' behalf. A Scott, *Law of Trusts*, p. 1410 (3d Ed. 1967).

[28] The suggestion of the United States that failure to pay the tax would "have exposed the trust to penalties and other clouds" (Brief for the United States, p. 12), including the possibility that the land might be sold (Id., p. 7), is extremely unpersuasive. A reasonable alternative would have been to pay the taxes but petition the Oklahoma Tax Commission for a refund. This was the course followed by the government in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943).

In its brief, the United States candidly acknowledges the existence of a "clear conflict of interest" between its fiduciary responsibility to the Osage Indians and its interest in revenue collection. (Brief for the United States, pp. 13-14.) This latter interest, the United States claims, might be jeopardized if *West* were overruled. As we understand this argument, the United States is concerned that an overruling of *West* might call into question cases where federal taxation of entities claiming immunity as state instrumentalities was sustained.[29] The United States acknowledges inconsistencies between the approach in *West* and that in *Squire,* and that "it is important . . . that the law be clarified so that the United States, as trustee, may know whether it remains bound to pay such taxes."[30] But despite the conceded importance of seeking this clarification the trustee took no action, and left it in-

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[29] The United States suggests that the vitality of *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938), could be so undermined. Brief for the United States, p. 14. With all deference, the Fund believes this argument to be far-fetched. In *Helvering* v. *Mountain Producers Corp., supra,* this Court held that profits from oil and gas production derived from a lease of state lands were not exempt from federal income taxation. The corporation had contended it was an instrumentality of the state by virtue of the lease; the Court held that the lessee must show how the taxation constituted a "direct and substantial interference" with the functions of government to invoke the instrumentality doctrine. 303 U.S. at 386-387. The grounds on which the Court of Claims held *West* should be overruled would leave the Court's rejection of the "instrumentality" doctrine in *West* untouched. We do not understand the Court of Claims or the respondents to suggest that the "instrumentality" doctrine should be revived, but merely that the Indian tax immunity rests upon the distinct and historic basis of the trust responsibility.

[30] Brief of the United States, p. 18.

stead to the beneficiaries to commence the litigation that is acknowledged to be necessary.

Failure to act cannot be justified by reference to the trustee's conflict of interest, assuming that such a conflict did exist in the present case. The Departments of Justice and the Interior here subordinated their fiduciary duties to protect the Indian interest to a supposed contrary interest in revenue production.[31] Such subordination breaches the trustee's obligation of exclusive loyalty to the interests of his beneficiary, which Professor Scott has termed "the most fundamental duty owed by the trustee to the beneficiaries." [32]

The Native American Rights Fund recognizes, of course, that executive departments ordinarily possess wide discretion to balance and resolve conflicts between various interests. Indeed, public policy usually is formulated by just that process. But in the unique area of Indian law, the executive departments have been charged with a *fiduciary duty* to protect Indian property rights. This duty sharply limits the otherwise broad discretion of executive officials to balance conflicting social interests.

As a fiduciary, the executive departments must resolve conflicts in favor of providing the maximum reasonable protection for the Indian beneficiary and his property. While the United States is not obligated to espouse claims for which there is no reasonable basis in law or fact, it must advance and protect rea-

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[31] But the Internal Revenue Service did not perceive any such "conflict," for it ceased levying federal estate and gift taxes on Osage allottees in 1969. Rev. Rul. 69-164, 1969, 1 Cum. Bull. 220.

[32] A Scott, *Law of Trusts*, p. 1297 (3d Ed. 1967).

sonable claims of the Indians. The rights of the trust beneficiaries may not be subordinated to "the national interest" by executive officials [33] except where Congress has authorized them to do so with the requisite clarity.[34] That is the underlying basis of cases such as *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968) and *United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339 (1941), discussed *supra* at p. 6, which hold that where Congress has not expressly provided for the extinguishment of Indian property rights, it shall be presumed to have intended their full protection and preservation. If the executive is to act other than as a most scrupulous fiduciary toward Indian property interests, Congress must have expressly authorized such action. Otherwise, it must be presumed that Congress expects undivided allegiance to the important national policies embodied in the federal trust responsibility.

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[33] Compare *Navajo Tribe* v. *United States,* 364 F.2d 320 (Ct. Cls. 1966), where it was held that the mining of helium by the Bureau of Mines on the Navajo Reservation during the Second World War was unlawful. The Court of Claims observed that the Bureau's action "may have been in the national interest, [yet unlawful because] they were not consistent with the Government's duty to the Navajos." 364 F.2d *supra* at 323-324.

[34] *Congress* alone may alter or abrogate Indian property rights, *see Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903) *supra,* thus balancing them with other conflicting values in the making of public policy. True, obtaining congressional consent to the taking of Indian property may sometimes be difficult or time-consuming, but Indian property rights are the product of treaty and agreement, protected by the important trusts responsibility. They ought not to be taken lightly or to be subject to loss as a result of executive fiat or subordination. As Mr. Justice Black eloquently observed: "Great nations, like great men, should keep their word." *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 142 (1960) (dissenting opinion).

Since the claim of Osage allottees that *West* had been substantially deprived of its vitality by the middle or late 1960s was clearly a reasonable one, it should have been pressed vigorously by the United States.

### IV. THIS COURT SHOULD OVERRULE WEST

The United States, therefore, should be liable for any damages caused by its failure to discharge its fidiary obligations. Of course, the respondents would only have been damaged if the United States would have succeeded in overturning *West* had it brought suit. Because of this, and the continued uncertainty as to the extent of the power of the State of Oklahoma to tax the estates of Osage allottees, this Court must determine the continued validity of *West*. The Fund submits that *West* should be overruled. In essence, our reasons for this conclusion are stated above in Part II of this brief. The analytical approach in *West* sets it apart from the main currents of federal Indian law and from the principles of the historic federal trust responsibility to Indians. Additionally, we note that subsequent decisions have confined the holding in *West* to the narrow fact situation presented by the Osage Allotment Act. *Squire* v. *Capoeman*, 351 U.S. 1 (1956), holds that the General Allotment Act of 1887 affords a broader tax immunity. And in the specific context of state inheritance taxes, the Court of Appeals for the Ninth Circuit has held that allotments created pursuant to the Mission Indian Act should be immune from state taxation. *Kirkwood* v. *Arenes*, 243 F. 2d 863 (9th Cir. 1957). The Fund can discern no reason in history, law or policy why the Osage allottees should not share in the general tax immunity recognized by these holdings as pertaining to other Indian allottees.

## CONCLUSION

For the reasons stated, the decision of the Court of Claims should be affirmed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

Syllabus

## UNITED STATES *v.* MASON, ADMINISTRATOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 72-654. Argued April 18, 1973—Decided June 4, 1973*

The United States did not breach its fiduciary duty as trustee of Indian property by paying the Oklahoma inheritance tax assessed against the estate of decedent, a restricted Osage Indian, in reliance on *West* v. *Oklahoma Tax Comm'n*, 334 U. S. 717, which had upheld the validity of that tax as applied to the same kind of estate. Pp. 4–9.

198 Ct. Cl. 599, 461 F. 2d 1364, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., concurred in the result.

*Together with No. 72-606, *Oklahoma* v. *Mason, Administrator, et al.*, also on certiorari to the same court.

# SUPREME COURT OF THE UNITED STATES

Nos. 72–654 AND 72–606

United States, Petitioner,
72–654 *v.*
Archie L. Mason et al.

State of Oklahoma, Petitioner,
72–606 *v.*
Archie L. Mason and Margaret R. Mason, etc., et al.

On Writs of Certiorari to the United States Court of Claims.

[June 4, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in these cases is whether a trustee in the course of administering its fiduciary obligations is entitled to rely on a directly relevant decision of this Court which has neither been overruled nor questioned. The Court of Claims ruled that the United States breached its fiduciary duty by failing to resist payment of Oklahoma's estate tax on certain trust property held by the United States acting as trustee for the benefit of the Osage Indians. The Court of Claims recognized that this Court, in *West* v. *Oklahoma Tax Comm'n*, 334 U. S. 717 (1948), had squarely upheld the validity of Oklahoma's inheritance tax as applied to restricted Osage Indians. But the lower court believed that *West* had been so undermined by later decisions of this and other courts that the United States had an obligation to challenge its continuing validity. Since the court also believed that such a challenge would have been successful,

it upheld both the plaintiff's claim against the United States for the amount of the tax and the United States' third party claim against Oklahoma for indemnification. We reverse. We hold that the United States was entitled to rely on *West* in paying the tax and thus did not breach its fiduciary obligations. It follows that the plaintiff below suffered no compensable damages and that the claim over by the United States drops out of the case.

I

The facts and legal background of this dispute may be briefly stated. Before 1906, the Osage reservation was held in trust for the Osage Tribe by the United States.[1] In that year, the Osage Allotment Act, 34 Stat. 539, was passed, which divided tribal land equally among members of the Tribe. However, an individual Indian was not permitted to alienate the land unless "the Secretary of the Interior, in his discretion, . . . [issued] . . . a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act."[2] See 34 Stat. 542.[3] In addition, the Act created so-called "headrights" which are each tribal member's individual share of the income derived from the

[1] The land in question originally belonged to the Cherokee Nation, but in 1866, the Cherokees entered a treaty with the United States authorizing the United States to settle friendly Indians in Cherokee territory. See 14 Stat. 799. Pursuant to this treaty, the Osage Indians settled the land in question, and in 1883, the Cherokees coveyed the area to the United States to be held in trust for the Osage Indians. See *West* v. *Oklahoma Tax Comm'n*, 334 U. S. 717, 720 (1948).

[2] The Act followed the pattern of the General Allotment Act of 1887, 25 U. S. C. § 331, which empowered the President to allot reservation land to certain Indians, but from which the Osage Indians were omitted.

[3] The Act has been frequently amended. See 78 Stat. 1008; 61 Stat. 747; 52 Stat. 1034; 45 Stat. 1478; 37 Stat. 86.

minerals located on the land. The minerals and this income were to be placed in trust for the individual tribal members, subject to periodic distribution from income, until 1984, when legal title to the minerals together with the accumulated income would vest in the individual Indians.[4] Various tribal funds were also placed in trust until that year. As amended, the Act provides that land and funds which are either restricted or held in trust "shall not be subject to lien, levy, attachment, or forced sale . . . prior to the issuance of a certificate of competency." 61 Stat. 747.

The decedent in this case, Rose Mason, was an Osage Indian who had not received a certificate of competency. Pursuant to the Osage Allotment Act, the United States held certain of her property in trust for her. Upon her death intestate, an Oklahoma estate tax return was filed which included in her gross estate these trust properties. The Federal Government then paid Oklahoma some $8,087.10 in estate taxes out of the trust properties. Although the decedent's administrators were discharged in 1968, in 1970 the estate was reopened for the purpose of permitting the administrators to challenge the United States' payment of the tax. A suit was filed in the Court of Claims alleging that the United States had breached its fiduciary duty in making the payment,[5] and that court upheld the claim together with the United

[4] Originally, the Act provided that the property in question would vest in the Indians in 25 years. See 34 Stat. 544. However, an amendment was passed in 1938 extending the trust period to 1984. See 52 Stat. 1035.

[5] The suit was brought under 28 U. S. C. § 1491 which gives the Court of Claims jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon an express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

States' third party claim against Oklahoma. See — Ct. Cl. —, 461 F. 2d 1364 (1972). We granted certiorari because of the seeming inconsistency between the decision below and our prior decision in *West* v. *Oklahoma Tax Comm'n, supra.* See 409 U. S. 1124.

## II

In *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598 (1943), this Court ruled that it could not infer a tax immunity extending to estate taxes on Osage property from the fact that Congress had placed restrictions on the alienability of the property. The *West* Court extended that ruling to property, such as that involved in this case, held in trust for the Osage Indians. The Court held that by placing the property in trust, Congress did not intend to immunize it from local taxation. Moreover, the federal instrumentality doctrine was found to be no bar to Oklahoma's estate tax. Although this doctrine had been used in earlier cases to invalidate state property taxes on trust porperty, see, *e. g., McCurdy* v. *United States,* 264 U. S. 484 (1924); *United States* v. *Rickert,* 188 U. S. 432 (1903), the Court distinguished estate taxes since "[a]n inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefit." 334 U. S., at 727. Discerning no congressional intent to immunize Osage trust property from state taxation and no constitutional bar to the tax, the Court upheld Oklahoma's claim.

As the Court of Claims itself recognized, the *West* decision "applied to the very type of trust property now before us." — Ct. Cl., at —, 461 F. 2d, at 1370.

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[6] Both the United States, as defendant below, and Oklahoma, as third party defendant below, petitioned for certiorari. We granted both petitions, cf. 41 U. S. C. § 114 (b) and consolidated the cases.

Nonetheless, the court thought that the rationale of *West* had been substantially undermined by *Squire* v. *Capoeman*, 351 U. S. 1 (1956), which held that the profits from the sale of timber on the land of a Quinaielt Indian held in trust for him pursuant to the General Allotment Act, 25 U. S. C. § 331, was immune from federal capital gains taxes.

It must be noted, however, that the *Squire* Court did not purport to question or overrule *West*, and, indeed, did not so much as mention that decision. The *Squire* case involved a different tax by a different level of government on the trust properties of a different tribe held pursuant to a different statute. As the *West* decision itself made clear, decisions relating to other types of taxes are not readily transferable to the area of estate and gift taxation where the tax is imposed on the transfer of property rather than on the property itself or the income it generates. Cf. *Plummer* v. *Coler*, 178 U. S. 115 (1900). Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of "all restrictions as to sale, encumbrance, or taxation" when Indian property is granted in fee—a provision which has no analogue in the Osage Allotment Act insofar as these trust properties are concerned.[7]

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[7] Respondents argue before this Court that our recent decision in *McClanahan* v. *Arizona State Tax Comm'n*, — U. S. — (1973), substantially extended the protection afforded Indian tribes against state taxation and therefore undermined *West*. *McClanahan*, however, concerned a state income tax on the income of a reservation Indian which was earned within the reservation—a situation wholly different from that presented here. Moreover, *McClanahan* cited *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598 (1943), the predecessor of *West*, with approval, and specifically distinguished the case of the Osage Indians by holding that "the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." — U. S., at —.

Nor can we agree with the Court of Claims that the foundations of *West* have been substantially weakened by subsequent lower court decisions. Apart from our difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of this Court, we think it clear that each of the cases relied upon below is distinguishable from *West*. Thus, while it is true that the Ninth Circuit construed the Mission Indian Act, 26 Stat. 712, to invalidate California's estate tax as applied to a California Mission Indian in *Kirkwood* v. *Arenas*, 243 F. 2d 863 (CA9 1957), the *Kirkwood* court carefully distinguished *West* and recognized its continuing validity. See 243 F. 2d, at 865. Similarly, the Court of Claims' reliance on its own decision in *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F. 2d 765 (1962), is misplaced since that decision, like *Squire*, concerned a federal income tax. See also *United States* v. *Hallam*, 304 F. 2d 620 (CA10 1962). And cases such as *Nash* v. *Wiseman*, 227 F. Supp. 552 (WD Okla. 1963), and *Aesnap* v. *United States*, 283 F. Supp. 566 (WD Okla. 1968), are of questionable relevance, since they arose under the General Allotment Act rather than the Osage Allotment Act. Cf. Rev. Rul. 69–164, 1969–1 Cum. Bull. 220.[8]

Thus, as the Court of Claims itself conceded, "since the *West* case in 1948, there has been no holding exactly on the precise issue now before us—the liability of such

[8] The Court of Claims relied in part upon a Technical Advice Memorandum issued by the Internal Revenue Service to the Oklahoma District Director of Internal Revenue on August 15, 1969. The Memorandum announced that henceforth, Osage trust property would be exempt from federal estate taxation. The court also pointed to *Beartrack* v. *United States*, Ct. Cl. No. 281–67, in which the United States settled a suit for refund of federal estate taxes paid on restricted trust properties. It is obvious, however, that Internal Revenue Service decisions as to the scope of its own taxing power have no effect on the taxing power of the States.

Osage property to state death taxation." — Ct. Cl., at —, 461 F. 2d, at 1372. Although it might be fair to say that over the years the fringes of the *West* doctrine have been worn away, its core holding remains unimpeached by any decisions of this or any other court.

We need not decide, however, whether in a case squarely presenting the issue, we would continue to adhere to *West*. For the issue in this case is not whether *West* should be overruled, but rather whether the United States breached its fiduciary duty in failing to anticipate that it would be overruled. Cf. *Helvering* v. *Griffiths*, 318 U. S. 371, 394 (1943).[9]

When the question is so posed, we think that the answer is obvious. There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust. See, *e. g.*, *Seminole Nation* v. *United States*, 316 U. S. 286, 296–297 (1942). But it has long been recognized that a trustee is not an insurer of trust property. As Professor Scott has written, "A trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." 2 Scott on Trusts 1408 (3d ed. 1967) (hereinafter cited as "Scott"). See, *e. g.*, *Phelps* v. *Harris*, 101 U. S. 370, 383 (1879). It follows that "[i]f the trust property is lost or destroyed or diminished in value, the trustee is not subject to a surcharge unless he failed to exercise the required care and skill." 2 Scott 1419.

Applying these familiar principles to the facts before us, we are required to decide whether the United States can be said to have acted with less than the requisite

[9] As all parties apparently recognize, the scope of the United States' fiduciary duty in administering the trust property is a question of federal law. Cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943).

care in refusing to contest the Oklahoma tax. When the State asserts a doubtful tax claim against trust property, the trustee is often presented with a close question. Normally, the trustee is obligated to pay taxes on the trust estate, and, indeed, if he negligently fails to do so, he may be held liable for any resulting penalty. See, *e. g.*, 2 Scott 1422. Yet, as this case demonstrates, if he pays the tax, he may similarly be called upon to reimburse the trust estate for the amount of the tax.

In order to avoid placing a trustee on the horns of this dilemma, most courts which have considered the problem have given trustees broad discretion to pay taxes claimed by the State so long as the trustee's judgment that the taxes are valid or that the costs and risks of litigation outweigh the advantages is not wholly unreasonable. See, *e. g.*, *Crutcher* v. *Joyce*, 146 F. 2d 518, 519 (CA10 1945); *In re Estate of Miller*, 66 Cal. Rptr. 756, 766 (1968); *In re Estate of Wehrhane*, 41 N. J. Super. 158, 166. 124 A. 2d 334, 338 (1956); *Henshie* v. *The McPherson and Citizens State Bank*, 177 Kan. 458, 479, 280 P. 2d 937, 953 (1955); *In re Vanderbilt's Will*, 77 N. Y. S. 403, 427 (1948); *Selleck* v. *Hawley*, 331 Mo. 1038, 1056–1057, 56 S. W. 2d 387, 395–396 (1932).

Thus, even if the *West* case had never been decided, the plaintiffs below would still have had difficulty in making out a case that the United States had breached its fiduciary duty by paying the tax. But of course *West* had been decided at the time the tax was paid, and we therefore deal here with an assertion of taxing authority which was not merely plausible but had been expressly approved by a decision of this Court. Generally, when a trustee is in doubt as to what course to pursue, the proper procedure for him to follow is to conform his conduct to the instructions given him by the courts. See, *e. g.*, *Mosser* v. *Darrow*, 341 U. S. 267, 274 (1951). Here, the United States did just that, and plaintiffs

below ask us to find that obedience to the instructions of this Court constitutes a breach of fiduciary duty.

It is, of course, true that Supreme Court decisions are on occasion overruled and that the opportunity to overrule them would never arise if litigants did not continue to challenge their validity. But in this context at least, it is unnecessary to penalize the United States' proper reliance on our past decisions in order to re-examine them, since there is no bar to a suit by plaintiffs below directly against Oklahoma for recovery of the tax. Cf. *Poafpybitty* v. *Skelly Oil Co.*, 390 U. S. 365 (1968). And if the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance. Cf. *Flood* v. *Kuhn*, 407 U. S. 258, 283 (1972); *Wallace* v. *M'Connell*, 38 U. S. (13 Pet.) 136, 150 (1839).

We do not have to say that a fiduciary may never be held liable for reliance on prior decisions of this Court. But as the discussion above demonstrates, the United States' reliance on *West* was reasonable in this situation. The *West* decision has neither been overruled nor questioned in our subsequent cases. It is fully consistent with later developments and has been followed without protest for 23 years. Since we find that the United States acted with the requisite care and prudence in following *West*, the decision below must be reversed with instructions to enter judgment dismissing the complaint.

*So ordered.*

MR. JUSTICE DOUGLAS concurs in the result.